TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. ~~293~~ 42.

CHARLES W. CLARK, PLAINTIFF IN ERROR,

vs.

P. O. WELLS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MONTANA.

FILED JUNE 8, 1905.

(19,795.)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 30, 1905.

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1 In the Circuit Court of the United States, Ninth Circuit, District of Montana.

P. O. WELLS, Plaintiff,
vs.
CHAS. W. CLARK, Defendant.

Be it remembered that on the 3rd day of November, 1904 a transcript on removal from the District Court of the First Judicial District of the State of Montana, in and for the County of Lewis & Clarke was filed which said transcript is as follows, to-wit:

2 In the District Court of the First Judicial District of the State of Montana in and for the County of Lewis & Clarke.

P. O. WELLS, Plaintiff,
vs.
CHARLES W. CLARK, Defendant. } Complaint.

The plaintiff in the above entitled action, complaining of the defendant in said action, alleges:—

I. That on the 28th day of December, 1903, at the City of Helena county of Lewis & Clarke, State of Montana, the said defendant, Charles W. Clark, made a certain promissory note in writing, bearing date on said day, which said promissory note is in words and figures as follows, to-wit:

$2500.00. HELENA, MONTANA, December 28, 1903.

Sixty days after date I promise to pay to the Union Bank and Trust Company Two Thousand Five Hundred and 00/100 Dollars value received, payable at the Union Bank and Trust Company, with interest at the rate of 6 per cent. per annum from date until paid. In case of suit hereon the maker agrees to pay a reasonable attorney's fee.

No. 289. CHARLES W. CLARK.
Due 2-26-'04.

Endorsed: Pay to the order of P. O. Wells. Union Bank and Trust Co. by Frank Bogart, Cashier.

3 and then and there delivered the said promissory note to the Union Bank and Trust Company, a corporation organized under the laws of the State of Montana, and doing business in the city of Helena, Montana, and that said Union Bank & Trust Company, on the 19th day of September, 1904, duly endorsed, assigned and delivered said promissory note to the plaintiff herein.

II. That the said plaintiff is now the lawful owner and holder of said promissory note.

III. That there is now due and unpaid to the said plaintiff on said promissory note the sum of Two Thousand Five Hundred

($2500.00) Dollars, lawful money of the United States, and interest thereon at the rate of Six per cent. per annum from the date of said note, to-wit: the 28th day of December, 1903.

IV. That said note provides the payment of reasonable attorney's fees, and that the sum of Two Hundred and Fifty ($250) Dollars is a reasonable attorney's fee.

Wherefore the Plaintiff pray- Judgment against the Defendant for the sum of $2500.00, lawful money of the United States, with interest thereon at the rate of six per cent. per annum from December 28th, 1903; also the sum of $250.00 attorney's fee; also costs of suit.

McCONNELL & McCONNELL,
Attorneys for Plaintiff.

STATE OF MONTANA, } ss:
Lewis & Clarke County, }

Personally appeared before the undersigned, a notary public in and for said County and State, P. O. Wells, who being duly sworn says: That he is the plaintiff in the above entitled action; that he has heard read the foregoing complaint and knows the contents thereof; that as to those matters alleged of his own knowledge it is true, and as to those matters alleged upon information and belief he believes it to be true.

P. O. WELLS.

4 Subscribed and sworn to before me this the 20th day of September, 1904.

[SEAL.] JOSEPH W. CHIVERS,
Notary Public in and for said County and State.

No. 5884 District Court First Judicial District Lewis and Clarke County, Montana. P. O. Wells, Plaintiff, vs. Charles W. Clark, Defendant. Complaint. Filed Sept. 20th, 1904 Finley McRae Clerk, by William T. Condon, Deputy Clerk. McConnell & McConnell, Attorneys for Plaintiff.

5 In the District Court of the First Judicial District of the State of Montana in and for the County of Lewis & Clarke.

P. O. WELLS, Plaintiff,
vs.
CHARLES W. CLARK, Defendant.

The State of Montana to the above named defendant, Greeting:

You are hereby summoned to answer the complaint in this action which is filed in the office of the Clerk of this Court, a copy of which is herewith served upon you, and to file your answer and serve a copy thereof upon the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service, and in case of your failure to appear or answer, Judgment will be taken against you by default for the relief demanded in the Complaint.

Witness my hand and the seal of said Court, this 20th day of September, 1904.

[SEAL.] FINLAY McRAE, Clerk,
By WILLIAM T. CONDON,
Deputy Clerk.

6 STATE OF MONTANA, } ss:
County of Lewis & Clarke, }

Office of the Sheriff.

I hereby certify, that I received the within Summons on the 20th day of September, A. D. 1904, and that after due search and diligent inquiry I have been unable to find Charles W. Clarke the within named defendant in Lewis & Clarke County.

Dated Helena, Montana, September 22nd, 1904.

JEFF O'CONNELL, Sheriff,
By WM. H. CURTIS,
Under Sheriff.

Endorsed: No. 5884 In the District Court of the State of Montana, in and for the County of Lewis and Clarke P. O. Wells, Plaintiff vs. Charles W. Clark, Defendant. Summons Filed September 22nd, 1904 Finlay McRae, Clerk by William T. Condon, Deputy Clerk. McConnell & McConnell, attorneys for plaintiff.

7 P. O. WELLS, Plaintiff,
vs.
CHARLES W. CLARK, Defendant.

Præcipe for Alias Summons issued.
Filed Sept. 6th, 1904.

FINLAY McRAE, Clerk,
By WILLIAM T. CONDON,
Deputy Clerk.

8 In the District Court of the First Judicial District of the State of Montana in and for the County of Lewis & Clarke.

P. O. WELLS, Plaintiff,
vs.
CHARLES W. CLARK, Defendant. } Affidavit for Attachment.

STATE OF MONTANA, } ss:
Lewis & Clarke County, }

Personally appeared before the undersigned, a Notary Public in and for said County and State P. O. Wells, who being first duly sworn says; That he is the plaintiff in the above entitled action; that the defendant in said action is indebted to him in the sum of Twenty-five Hundred Dollars, lawful money of the United States, with interest thereon from the 28th day of December, 1903, over and above all legal set-offs and counter claims upon an express contract for the direct payment of money to-wit: upon a promissory

note made by the defendant to the Union Bank & Tr Company of Helena, Montana, and by said bank duly assigned to him, on the 19th day of September, 1904 that the same is now due and that payment of the same is not secured by any mortgage, lien or pledge upon real or personal property. That the attachment is not sought and the action is not prosecuted to hinder, delay or defraud any creditor of the defendant.

P. O. WELLS.

9 Subscribed and sworn to before me this 20th day of September 1904.

[SEAL.] JOSEPH W. CHIVERS,
Notary Public in and for said County and State.

Endorsed: No. 5884 District Court First Judicial District Lewis & Clark County Montana. P. O. Wells, Plaintiff vs. Charles W. Clark Defendant. Affidavit Filed Sept. 20th, 1904 Finlay McRae, clerk By William T. Condon, Deputy Clerk. McConnell & McConnell Attorneys for Plaintiff.

10 In the District Court of the First Judicial District of the State of Montana in and for the County of Lewis & Clarke.

P. O. WELLS, Plaintiff,
vs.
CHARLES W. CLARK, Defendant. } Undertaking on Attachment.

Whereas, the above named plaintiff has commenced, or is about to commence an action in the District Court of the First Judicial District of the State of Montana in and for the County of Lewis & Clarke, against the above named defendant on a contract for the direct payment of money, claiming that there is due to the said plaintiff from the said defendant the sum of Twenty-five Hundred Dollars, lawful money of the United States, besides interest, attorneys' fees and is about to apply for an attachment against the property of the said defendant as security for the satisfaction of any judgment that may be recovered therein.

Now therefore, the undersigned, the United States Fidelity and Guaranty Company of Baltimore, Maryland, in consideration of the premises and of the said attachment, does undertake, in the sum of Twenty-five hundred dollars, and promise to the effect that if the said defendant recover judgment, or if the court shall finally decide that the plaintiff is not entitled to an attachment in said action, the said plaintiff will pay all costs that may be awarded to the said defendant and all damages which he may sustain by reason of
11 the issuing out of the attachment, not exceeding the sum of Twenty-five Hundred Dollars.

Witness our hands and seals, this 20th day of Sept. 1904.

P. O. WELLS. [SEAL.]
THE UNITED STATES FIDELITY AND GUARANTY CO. [SEAL.]
FRANK BOGART, Attorney in Fact. [SEAL.]

[SEAL.]

STATE OF MONTANA, } ss:
County of —, }

And whose names are subscribed as the sureties to the above undertaking, being severally duly sworn, each for himself says that he is responsible and a householder or freeholder within the State of Montana, and that he is worth the sum specified in the above undertaking over and above all his just debts and liabilities, exclusive of property exempt from execution.

Subscribed and sworn to before me this — day of —— 189–

——— ———,

Notary Public in and for — County, Montana.

Endorsed: No. 5884 In the District Court Judicial District County of — P. O. Wells, plaintiff vs. Charles W. Clark, de-
12 fendant Undertaking on Attachment. Approved and filed this 20th day of Sept. 1904 Finlay McRae Clerk by William T. Condon, Deputy Clerk McConnell & McConnell Attorney for Plaintiff Recorded in Book 2, Undertakings on Attachment page 158.

13 In the District Court of the First Judicial District of the State of Montana in and for the County of Lewis & Clarke.

P. O. WELLS, Plaintiff,
vs.
CHARLES W. CLARK, Defendant. } Writ of Attachment.

The State of Montana to the Sheriff of Silver Bow County, Greeting:

Whereas, the above entitled action was commenced in the District Court of the First Judicial District of the State of Montana, in and for the County of Lewis & Clarke, by the plaintiff in said action, to recover from the defendant in said action the sum of twenty-five hundred dollars, lawful money of the United States, besides interest at the rate of six per cent. per annum from the 23rd day of December, A. D. 1903 attorney's fees and costs of suit, and the necessary affidavit and undertaking having been filed, as required by law.

Now, we do therefore command you, the said sheriff, that you attach and safely keep all the property of the said defendant within your said county, not exempt from execution, or so much thereof as may be sufficient to satisfy said plaintiff's demand, as above mentioned, unless the said defendant give you security by the undertaking of at least two sufficient sureties, in an amount sufficient to satisfy such demand, besides costs, or in an amount equal to the value of the property which has been or is about to be at-
14 tached, in which case you will take such undertaking. And hereof make due and legal service and return.

Witness the Honorable J. M. Clements, Judge of the said District Court, this 20th day of Sept. A. D. 1904.

Attest my hand and the seal of said Court the day and year last above written.

FINLAY McRAE, Clerk,
By WILLIAM T. CONDON,
Deputy Clerk.

[SEAL.]

Endorsed: No. 5884 District Court First Judicial District, County of Lewis and Clarke, Montana. P. O. Wells, Plaintiff vs. Charles W. Clark, Defendant. Writ on Attachment. Filed this 24th day of Sept. A. D. 1904 Finlay McRae, Clerk by John E. Stuart, Deputy Clerk. McConnell & McConnell, Attorneys for plaintiff.

15 STATE OF MONTANA, } ss:
County of Silver Bow, Office of the Sheriff, }

I do hereby certify, That I received the within writ of attachment on the 21st day of Sept. A. D. 1904, and by virtue thereof, I did, on the 22nd day of Sept. A. D. 1904 attach all the right, title or interest of the defendant Chas. W. Clark and standing on the records of Silver Bow County in the name of Katherine Q. R. Clark, by filing with the County Clerk and Recorder of Silver Bow County, Montana, a copy of the within writ, together with a description of the property attached, and a notice that it is attached. Description:

All the right, title, and interest of the defendant Chas. W. Clark, in and to the following real estate to wit: Lots nine (9) and ten (10) in Block Twenty-one (21) of the Original Townsite of Butte, Silver Bow County, Montana, and all the buildings and improvements thereon, standing in the name of Katherine Q. R. Clark on the records of the Recorder's Office in said County.

I further certify, that I served a true copy of the within writ together with a description of the property attached on A. J. Shores the present occupant of the above described premises, on the 22nd day of Sept. A. D. 1904. I hereby return said writ of attachment without further service.

Dated this 23rd day of Sept. A. D. 1904.

JOHN J. QUINN, Sheriff,
By JNO. S. WYMAN, Deputy.

16 In the District Court of the First Judicial District of the State of Montana in and for the County of Lewis & Clark.

P. O. WELLS, Plaintiff,
vs.
CHARLES W. CLARK, Defendant.

To Clerk First Judicial District Court:

Please issue alias Summons in the above entitled cause.

McCONNELL & McCONNELL,
Attorney- for Pl't'f-.

Endorsed: No. 5884 In the District Court of the First Judicial District in and for the County of Lewis & Clarke.

17 In the District Court of the First Judicial District of the State of Montana in and for the County of Lewis & Clark.

P. O. WELLS, Plaintiff,
vs.
CHARLES W. CLARK, Defendant.

Petition for Removal to Circuit Court of the United States for the District of Montana.

Your petitioner, Charles W. Clark, appearing especially for this purpose and no other, and waiving no right to object to the jurisdiction of the Court over his person or property respectfully shows to this honorable Court:

That he is the defendant in this suit, which is of a Civil nature, and that the matter and amount in dispute in this cause exceeds the sum or value of two thousand dollars, exclusive of interest and costs; that the controversy herein is between citizens of different States; that the plaintiff P. O. Wells, was at the time of the commencement of this suit, and is a citizen of the State of Montana. That your petitioner Charles W. Clark, was at the time of the commencement of this suit, and still is, a citizen of the State of California, and of no other State, residing in San Mateo, California, and is not a resident of the State of Montana. That your petitioner desires to remove this suit before a trial thereof to the next United States Circuit Court to be h[illegible]he District of Montana, and your peti-

18 tioner offers herewith good and sufficient surety for his entering in the Circuit Court of the United States for the District of Montana on the first day of its next session to be held at Butte, Montana, a copy of the record in this suit, and for the payment of all costs that may be awarded by the said Circuit Court of the United States if said court shall hold that this suit is wrongfully and improperly removed thereto.

And your petitioner therefore prays that the said surety and bond may be accepted; but that said suit may be removed into the next Circuit Court of the United States to be held at Butte in the District of Montana pursuant to the statutes of the United States in such cases made and provided and that no further proceedings be had herein in this Court.

And he will ever pray.

W. M. BICKFORD,
GEORGE F. SHELTON,
Attorneys for Petitioner, Charles W. Clark.

STATE OF MONTANA,
County of Silver Bow, } ss:

George F. Shelton, being first duly sworn, deposes and says:

That he is one of the attorneys for the petitioner in the above entitled action; that he makes this affidavit of verification for the reason that said petitioner is not within the County of Silver Bow, State of Montana, where affiant resides, and cannot make this affi-

davit for himself. That he has read the foregoing petition, and knows the contents thereof, and that the same is true according to the best knowledge, information and belief of affiant.

GEORGE F. SHELTON.

Subscribed and sworn to before me this 15th day of October, 1904.

19

A. W. DEVITT,
[SEAL.] Notary Public in and for Silver Bow County, Montana.

Endorsed: No. 5884. In the District Court of the County of Lewis & Clark State of Montana. P. O. Wells, Plaintiff vs. Charles W. Clark, Defendant. Petition for removal to Circuit Court of the United States for The District of Montana. Filed Oct. 18th, 1904 Finlay McRae, Clerk by Rae C. Clements Dep. Cl'k.

20 In the District Court of the First Judicial District of the State of Montana, in and for the County of Lewis & Clark.

P. O. WELLS, Plaintiff,
vs.
CHARLES W. CLARK, Defendant.

Bond on Removal.

Know all men by these presents, that the undersigned, J. K. Heslet and A. H. Wethy, of the City of Butte, County of Silver Bow, State of Montana, are held and stand firmly bound unto P. O. Wells, in the penal sum of three hundred dollars, for payment whereof, well and truly to be made unto said P. O. Wells, his heirs, executors, administrators and assigns, we bind ourselves, our heirs and representatives and assigns, jointly and severally, firmly by these presents.

Upon the condition, nevertheless, That whereas, the said Charles W. Clark, has filed his petition in District Court of the First Judicial District of the State of Montana, in and for the County of Lewis and Clarke, for the removal of a certain cause therein pending, wherein the said P. O. Wells, is plaintiff and the said Charles W. Clark is defendant, to the Circuit Court of the United States for the District of Montana:

Now if the said Charles W. Clark shall enter in the said Circuit Court of the United States on the first day its next session to be held at Butte, Montana, a copy of the record in said suit, shall well, and truly pay all costs that may be awarded by the said Circuit
21 Court of the United States, if said Court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation to be void, otherwise, to remain in full force and virtue.

In witness whereof, we have hereunto set our hands and seals this 15th day of October, 1904.

J. K. HESLET.
A. H. WETHY.

STATE OF MONTANA, County of Silver Bow, } ss:

J. K. Heslet and A. H. Wethy being first severally duly sworn deposes and says: that they are residents and householders in the county of Silver Bow, State of Montana; that they are worth the amount specified in the above undertaking as the penalty thereof over and above his just debts in property by law exempt from execution.

J. K. HESLET.
A. H. WETHY.

Subscribed and sworn to before me this 15th day of October 1904.

[SEAL.] A. W. DEVITT,
Notary Public in and for Silver Bow County, Montana.

Endorsed: No. 5584. In the District Court of Lewis & Clarke County, State of Montana P. O. Wells, Plaintiff vs. Charles W. Clark, Defendant. Bond on Removal. The within bond is hereby approved this 18th day of October 1904. J. M. Clements, Judge. Filed Oct. 18th, 1904 Finlay McRae, Clerk By Rae C. Clements, Dept. Clk.

22 District Court of the First Judicial District, State of Montana in and for Lewis and Clarke County, Department No. 2. October 18th, 1904

Title of Cause. No. 5884.

In this cause the defendant herein having within the time provided by law filed his petition for removal of this cause to the Circuit Court of the United States for the District of Montana, and having at the same time offered his bond in the sum of three hundred dollars with J. K. Heslet and A. H. Wethey as good and sufficient sureties pursuant to the statute, conditioned according to law; court this day hereby accepts said petition, and ordered that this cause be removed for trial to the next Circuit Court of the United States for the District of Montana to be held at Butte, Silver Bow County, pursuant to the statutes of the United States, and that all other proceedings in this Court be stayed.

J. M. CLEMENTS, Judge.

23 In the District Court of the First Judicial District of the State of Montana in and for the County of Lewis & Clarke.

P. O. WELLS, Plaintiff,
vs.
CHARLES W. CLARK, Defendant.

Order for Removal.

The defendant herein having within the time provided by law filed his petition for removal of this cause to the Circuit Court of the United States for the District of Montana and having at the same

time offered his bond in the sum of three hundred dollars with J. K. Heslet and A. H. Wethy as good and sufficient sureties pursuant to the statute, conditioned according to law.

Now therefore, this court does hereby accept and approve said bond, and accept said petition, and it is ordered that this cause be removed for trial to the next circuit court of the United States for the district of Montana, to be held at Butte, Silver Bow county, pursuant to the statutes of the United States, and that all other proceedings in this court be stayed.

Dated this 18th day of October, 1904.

J. M. CLEMENTS, Judge.

Endorsed: No. 5884. In the District Court of the State of Montana. P. O. Wells, plaintiff vs. Charles W. Clark, defendant. Order for removal. Filed Oct. 18th, 1904. Finlay McRae, clerk by Rea C. Clements, deputy cl'k.

24 District Court of the First Judicial District, State of Montana, in and for Lewis & Clarke County, Department No. 2, November 1st, 1904.

Title of Cause.

No. 5884.

In this cause Court this day granted plaintiff leave to withdraw from the files the affidavit for publication of summons and the order for publication of summons filed October 27th, 1904.

J. M. CLEMENTS, Judge.

25 STATE OF MONTANA, } ss:
County of Lewis and Clarke, }

I hereby certify that the foregoing is a full, true correct and compared copy of the original Complaint, Affidavit on Attachment, undertaking on attachment, Summons, Writ of attachment, præcipe for alias Summons, petition for removal, Bond on removal, order for removal minute entry of October 18th, and minute entry of November 1st, 1904 in case No. 5884 P. O. Wells vs. Charles W. Clark, as the same appears to me of record.

In witness whereof, I have hereunto set my hand and affixed the official seal of this court, this 2nd day of November A. D. 1904.

[SEAL.]

FINLAY McRAE,
Clerk of District Court,
By GEO. E. BAYHA,
Deputy Clerk.

Endorsed: Title of court and cause Transcript on removal. Filed and entered Nov. 3, 1904. Geo. W. Sproule Clerk.

26 And thereafter to-wit on the 3rd day of November, 1904 an affidavit for order that service of summons may be made by publication was filed which is in words and figures as follows, to-wit:

27 In the Circuit Court of the United States, Ninth Circuit, District of Montana.

P. O. WELLS, Plaintiff,
vs.
CHARLES W. CLARK, Defendant. } Affidavit.

UNITED STATES OF AMERICA.

STATE OF MONTANA,
Lewis & Clarke County, } ss:

N. W. McConnell being duly sworn says: That he is of counsel for the plaintiff in the above entitled action; that the complaint in said action was filed with the Clerk of the District Court of the First Judicial District of the State of Montana, on the 20th day of September, 1904, and summons thereon issued; that said action is brought to recover the sum of $2500.00 due and unpaid from said defendant Charles W. Clark, to the plaintiff, P. O. Wells, upon a promissory note made by said defendant and dated on the 28th day of December, 1903, payable in sixty days after date to the Union Bank and Trust Company, and by it assigned to plaintiff, and interest from date at the rate of six per cent. per annum until paid, and reasonable attorneys' fees. The cause of action is fully set forth in the verified complaint on file herein. That said defendant resides out of this State and cannot, after due diligence, be found therein, and this affiant, in support thereof, states the following facts and circumstances;—

28 George F. Shelton, the attorney for the defendant, has filed a petition (appearing specially for that purpose) for the purpose of removing this case from the State District Court to the United States Circuit Court, and in said petition, verified by said attorney, it is alleged that the defendant is a resident of San Mateo, California; and affiant further says that he has conversed with another one of the defendant's attorneys, W. M. Bickford, who stated to him that the defendants was in said town in the State of California. Affiant further states of his own knowledge that he saw the defendant in the State of Montana, in the City of Helena, in the month of May last, at the time process was served upon him in another suit pending in this court, and that shortly afterwards said defendant left this State and went either to Jerome, in the Territory of Arizona, or to the State of California, and that he has never seen or heard of the defendant being in this State since. Affiant further states that he has made diligent inquiry to find said defendant and cannot, after due diligence, find him within this State. Affiant further states that a cause of action exists against the defendant in respect of which the service of summons is to be made, and that he is a necessary and proper party to the action.

Affiant further states that personal service of said summons cannot be had on said defendant, Charles W. Clark, and prays for an order that service of summons in the case may be made by publication thereof.

N. W. McCONNELL.

Subscribed and sworn to before me this 3rd day of November, 1904.

LOUIS PENWELL,
Notary Public in and for Lewis & Clarke
County, State of Montana.

Endorsed: Title of court and cause: Affidavit. Filed and Entered Nov. 3, 1904 Geo. W. Sproule, Clerk.

29 And thereafter to-wit on the 3rd day of November, 1904 an order for service by publication of summons was made and entered being as follows, to-wit:

30 In the Circuit Court of the United States, Ninth Circuit, District of Montana.

P. O. WELLS, Plaintiff,
vs.
CHARLES W. CLARK, Defendant. } Order.

Upon reading and filing the affidavit of N. W. McConnell and it satisfactorily appearing therefrom that the defendant Charles W. Clark, has departed from and resides out of this State and cannot, after due diligence, be found within this State, and it also appearing from the complaint herein, duly verified by the plaintiff, that a good cause of action exists in this action in favor of the plaintiff therein and against the defendant, and that the defendant, Charles W. Clark, is a necessary and proper party defendant thereto, and it further appearing that a summons has been duly issued out of the State District Court in this action, and that personal service of the same cannot be made upon the said defendant, Charles W. Clark, for the reasons hereinbefore, and by the said affidavit, made to appear; on motion of McConnell & McConnell, attorneys for the plaintiff;

It is ordered that service of summons in this action be made upon the defendant, Charles W. Clark, by publication thereof in the Daily Independent, a newspaper published at the City of Helena, County of Lewis & Clarke, State of Montana, hereby designated as
31 the Newspaper most likely to reach the said defendant; that such publication be made at least once a week for four successive weeks.

And it further in like manner satisfactorily appearing to me that the residence of the said defendant is known to be at the City of San Mateo, State of California, it is Ordered and Directed that a copy of the summons and complaint in this suit be forthwith deposited in the United States Post Office at the City of Helena, Montana, post paid, and directed to the said defendant at his said place of residence.

GEO. W. SPROULE,
Clerk of the United States Circuit Court in and for the
Ninth Circuit, District of Montana.

Endorsed: Title of court and cause Order Filed and entered Nov. 3rd, 1904 Geo. W. Sproule, Clerk.

32 And thereafter to-wit on *on* the 3rd day of November, 1904 a summons was issued as follows, to-wit:

33 UNITED STATES OF AMERICA:

Circuit Court of the United States, Ninth Circuit, District of Montana.

P. O. WELLS, Plaintiff,
vs.
CHARLES W. CLARK, Defendant.

Action Brought in the said Circuit Court and the Complaint Filed in the Office of the Clerk of said Circuit Court, in the City of Helena, County of Lewis & Clarke.

The President of the United States of America to the above named defendant, Charles W. Clark, Greeting:

You are hereby summoned to answer the complaint in this action which is filed in the office of the Clerk of this Court, a copy of which is herewith served upon you, and to file your answer and serve a copy thereof upon the plaintiff's attorney within twenty days after the service of this summons exclusive of the day of service; and in case of your failure to appear or answer, judgment will be taken against you by default, for the relief demanded in the complaint.

This action is brought for the recovery of a judgment of $2500.00 with interest at the rate of six per cent. per annum from December 28th, 1903, and costs of suit, and $250.00 counsel fees, upon a promissory note for said sum of $2500.00 dated Dec. 28th, 1903, due 60 days after date, executed by the defendant to the Union Bank & Trust Company and by it transferred to the plaintiff.

Witness the Honorable Melville W. Fuller Chief Justice of the United States this 3rd day of November in the year of our Lord one thousand nine hundred and four and of our independence the 129th.

GEO. W. SPROULE, Clerk.

Endorsed: Title of court and cause. Summons. McConnel- & McConnell Attorneys for plaintiff Filed Nov. 30, 1904. Geo. W. Sproule, Clerk.

34 And thereafter to-wit on the 30th day of November, 1904, Proof of service by publication was made as follows, to-wit:

35 UNITED STATES OF AMERICA:

Circuit Court of the United States, Ninth Circuit, District of Montana.

P. O. WELLS, Plaintiff,
vs.
CHARLES W. CLARK, Defendant.

Action Brought in the said Circuit Court and the Complaint Filed in the Office of the Clerk of said Circuit Court, in the City of Helena, County of Lewis & Clarke.

The President of the United States of America to the above named defendant, Charles W. Clark, Greeting:

You are hereby summoned to answer the complaint in this action which is filed in the office of the Clerk of this Court, a copy of which is herewith served upon you, and to file your answer and serve a copy thereof upon the plaintiff's attorney within twenty days after the service of this summons exclusive of the day of service; and in case of your failure to appear or answer, judgment will be taken against you by default, for the relief demanded in the complaint.

This action is brought for the recovery of a judgment of $2500.00 with interest at the rate of six per cent. per annum from December 28th, 1903, and costs of suit, and $250.00 counsel fees, upon a promissory note for said sum of $2500.00 dated Dec. 28th, 1903, due 60 days after date, executed by the defendant to the Union Bank & Trust Company and by it transferred to the plaintiff.

Witness the Honorable Melville W. Fuller Chief Justice of the United States this 3rd day November in the year of our Lord One thousand nine hundred and four and of our independence the 129th.

GEO. W. SPROULE, Clerk.

Summons. McConnel & McConnell Attorneys for plaintiff First Publication Nov. 4, 1904.

36 Affidavit of Publication.

STATE OF MONTANA,
County of Lewis & Clarke.

E. B. Kennedy being duly sworn, deposes and says: that he is principle clerk of the Helena Daily Independent, a newspaper of general circulation, printed and published in Helena, Lewis & Clarke County, Montana, that the notice hereunto annexed: Summons—P. O. Wells vs. Charles W. Clark has been correctly published in the regular and entire issue of every number of said paper for four consecutive weeks commencing on the 4th day of November, 1904 and ending on the 25th day of November, 1904.

[SEAL.] E. B. KENNEDY.

Subscribed and sworn to this 25th day of Nov. A. D. 1904.

RAY CHURCH,
Notary Public in and for Lewis & Clarke
County, State of Montana.

Endorsed: Title of court and cause Proof of Publication Filed and Entered Nov. 30th, 1904 Geo. W. Sproule, Clerk.

37 And thereafter to-wit on the 29th day of March, 1905 affidavit of mailing copy of summons to defendant was filed as follows, to-wit:

38 In the Circuit Court of the United States, Ninth Circuit, District of Montana.

P. O. WELLS, Plaintiff,
vs.
CHARLES W. CLARK, Defendant.

UNITED STATES OF AMERICA, District of Montana, } ss:

I Geo. W. Sproule, being duly sworn depose and say That I am the duly appointed, qualified and acting clerk of the United States Circuit Court for the District of Montana, that as such clerk on or about November 3rd, 1904, I deposited in the Post Office at Helena, Montana, a copy of the Summons together with a certified copy of the complaint attached in case entitled P. O. Wells vs. Chas. W. Clark in an envelope postage fully paid addressed to the defendant Charles W. Clark at San Mateo, California.

GEO. W. SPROULE.

Subscribed and sworn to before me this 29th day of March, 1905.

WM. H. HUNT,
U. S. District Judge.

Endorsed: Title of court and cause. Affidavit as to Mailing copy of Summons and Complaint. Filed and entered Mar. 29th, 1905. Geo. W. Sproule, Clerk.

39 And thereafter to-wit on the 6th day of December 1904 an alias summons was issued herein which said summons with proof of service was filed Feb. 10th, 1905 being as follows, to-wit:

40 UNITED STATES OF AMERICA.

Circuit Court of the United States, Ninth Circuit, District of Montana.

P. O. WELLS, Plaintiff,
vs.
CHARLES W. CLARK, Defendant.

Action Brought in the said Circuit Court, and the Complaint Filed in the Office of the Clerk of said Circuit Court, in the City of Helena, County of Lewis & Clarke.

The President of the United States of America to the above-named defendant, Charles W. Clark, Greeting:

You are hereby summoned to answer the complaint in this action which is filed in the office of the Clerk of this Court, a copy of which

is herewith served upon you, and to file your answer and serve a copy thereof upon the plaintiff's attorney within twenty days after the service of this summons exclusive of the day of service; and in case of your failure to appear or answer, judgment will be taken against you by default, for the relief demanded in the complaint.

This action is brought for the recovery of a judgment of $2500.00 with interest at the rate of six per cent. per annum from December 28th, 1903, and costs of suit, and $250.00 counsel fees, upon a promissory note for said sum of $2500.00 dated Dec. 28th, 1903, due 60 days after date, executed by the defendant to the Union Bank & Trust Company and by it transferred to the plaintiff.

[SEAL.] Witness the Honorable Melville W. Fuller Chief Justice of the United States this 6th day of December in the year of our Lord One thousand nine hundred and four and of our Independence the 129th.

GEO. W. SPROULE, Clerk.

41 UNITED STATES MARSHAL'S OFFICE, Northern District of California.

I hereby certify that I received the within summons on the 10th day of December, 1904 and personally served the same on the 29th day of December, 1904 on Charles W. Clark by delivering to and leaving with Charles W. Clark said defendant named therein personally at San Mateo County of San Mateo in said District, a certified copy thereof, together with a copy of the Complaint, certified to by Clerk of the U. S. Circuit Court, District of Montana attached thereto.

Dated this 30th day of December, 1904.

JOHN H. SHINE,
U. S. Marshal,
By E. A. MORSE,
Office Deputy.

Endorsed: Title of court and cause Summons McConnell & McConnell Plaintiff's attorneys. Filed Feb. 10th, 1905 Geo. W. Sproule, Clerk by F. H. Drake, Deputy Clerk.

42 In the Circuit Court of the United States, Ninth Circuit, District of Montana.

P. O. WELLS, Plaintiff,
vs.
CHARLES W. CLARK, Defendant. } Affidavit.

STATE OF CALIFORNIA,
City and County of San Francisco, U. S. A. } ss:

Personally appeared before the undersigned, the Clerk of the Circuit Court of the United States, at the City of San Francisco, California, E. A. Morse, who being duly sworn deposes and says; that he is of lawful age; that he is a deputy U. S. Marshal of the United States for the Northern District of the State of California; that he

personally served the within summons and a copy of the complaint in said case upon the defendant, Charles W. Clark, by delivering to him a copy of said complaint and a copy of the within summons on the 29th day of December, 1904 at San Mateo, State of California.

E. A. MORSE.

Subscribed and sworn to before me this the 30th day of December, 1904.

J. A. SCHAERTZER,
Deputy Clerk Circuit Court U. S. A. of the
Northern District, State of California.

43 And thereafter to-wit on the 6th day of December, 1904 a motion to quash service of summons was duly filed which said motion is entered of record as follows, to-wit:

44 In the Circuit Court of the United States, Ninth Circuit, District of Montana.

P. O. WELLS, Plaintiff,
vs.
CHARLES W. CLARK, Defendant.

Motion to Quash Service of Summons.

Now comes the above named defendant, and appearing specially for the purpose of this motion, and for no other purpose, and not in any way acceding or consenting to the jurisdiction of the court except so far as may be necessary for the purposes of this motion, and moves the court to quash the pretended service of summons in this cause upon the grounds and for the reasons following, to-wit:

1. That the said summons has never at all or in any manner been served upon the defendant herein personally in the State and district of Montana, nor has the defendant ever at any time waived service of summons or voluntarily entered his appearance in this cause.

2. That the publication of summons herein, wherein and whereby the said summons has been published in a newspaper, does not give the court any jurisdiction over the said defendant, nor is such service by publication permissible or in accordance with the rules of procedure in the United States court nor is the same sanctioned or authorized by any law of the United States, and the said pre-

45 tended service of summons by publication is wholly and absolutely void under the laws of the United States.

W. M. BICKFORD,
GEO. F. SHELTON,
Attorneys for Defendant, Appearing
Specially for this Motion.

I hereby certify that in my opinion the within and foregoing motion is good in point of law.

GEO. F. SHELTON,
Of Counsel for Defendant, Appearing Specially
for this Motion.

UNITED STATES OF AMERICA, District of Montana, County of Silver Bow, } ss:

A. W. Devitt, being first duly sworn, deposes and says: That he is a citizen of the United States, over the age of twenty one years, and a resident of Butte, Silver Bow County, Montana; that McConnell & McConnell are the attorneys of record for the plaintiff named in the action mentioned in the attached motion to quash service of summons, and that they reside in the city of Helena, Lewis & Clark County, State of Montana; that in each of said places there is a United States postoffice, and between said two places there is a regular daily communication by mail; that on the 6th day of December, 1904, deponent served a true copy of the attached motion on said McConnell & McConnell, attorneys for the plaintiff, by depositing said copy of said motion, on said date in the post office at said city of Butte, Silver Bow County Montana, properly enclosed
46 in a sealed envelope addressed to said McConnell & McConnell, attorneys at law, Helena, Montana, and prepaying the postage thereon.

A. W. DEVITT.

Subscribed and sworn to before me this 6th day of December, 1904.

WM. C. SIDERKIN,
[SEAL.] Notary Public in and for Silver Bow County, State of Montana.

Endorsed: Title of court and cause Motion to quash service of Summons. Filed and entered Dec. 6, 1904 Geo. W. Sproule, Clerk by F. H. Drake, Deputy.

47 And thereafter, to-wit, on the 20th day of March, 1905, an Opinion overruling Motion to Quash service of Summons herein was duly filed and entered, which said Opinion is as follows, to-wit:

48 In the Circuit Court of the United States, Ninth Circuit, District of Montana.

P. O. WELLS, Plaintiff,
vs.
CHARLES W. CLARK, Defendant. } Memorandum Opinion on Motion to Quash Summons.

Plaintiff commenced this action in the District Court of the State State of Montana, in and for the County of Lewis and Clarke, to recover judgment against the defendant for the sum of $2500.00, and interest, and attorneys' fee alleged to be due upon a promissory note made by the Defendant on December 28th, 1903, wherein he promised to pay to the Union Bank and Trust Company $2500.00 with interest at the rate of six per cent. per annum from date until paid. It is alleged that the Union Bank and Trust Company on September 19th, 1904, endorsed, assigned and delivered the promissory note sued upon to the plaintiff herein. Summons in due form was

issued out of the District Court aforesaid. An affidavit for attachment, duly made under the laws of the State of Montana, was filed on September 20th, together with the necessary undertaking and writ of attachment issued to the Sheriff of Silver Bow County, Montana. On September 23rd, the Sheriff of Silver Bow County made his return to the writ, certifying that by virtue thereof, on September 22nd, 1904, he attached the interests of the defendant, C. W. Clark, in and to certain real estate in Silver Bow County, standing on the records in the name of Katherine Q. R. Clark. On October 18th, 1904, the defendant, C. W. Clark, appearing specially for the purpose of the motion, and no other, and waiving no right to
49 object to the jurisdiction of the District Court over his person or property, filed a petition in the said District Court for the removal of the suit to the United States Circuit Court. The ground of this motion was based upon the fact that C. W. Clark was at the time of the commencement of this suit, and at the time of motion, a citizen of the State of California, residing in said State, and that the plaintiff therein was a citizen of the State of Montana. Defendant furnished the necessary bond on removal, and upon October 18th, the District Court of the State ordered that the cause be removed for trial to the Circuit Court of the United States for the District of Montana.

After the transcript on removal had been filed and entered in this court, on November 3rd, 1904, N. W. McConnell, Esq., counsel for the plaintiff, filed an affidavit setting forth the institution of the action in the District Court of the First Judicial District of the State, and the issuance of summons, the nature of the action, together with a statement that defendant resides out of the State of Montana, and cannot, after due diligence, be found therein. In support of affiant's statements, he alleged in his affidavit that George F. Shelton, Esq., Attorney for defendant, had filed a petition, appearing specially for that purpose, for the purpose of removing the cause from the said District Court to the United States Circuit Court; and in said petition it was alleged that defendant was a resident of the State of California. The affidavit further stated that personal service of the summons issued could not be had on the defendant, and prayed for an order that service of the summons in the case might be made by publication thereof. The Clerk of the Court thereafter made an order reciting that it satisfactorily appearing by the affidavit of N. W. McConnell, Esq., that the defendant had departed from and resides out of the State of Montana, and that a good cause of action exists in favor of plaintiff and
50 against defendant, and it further appearing that summons had been duly issued out of said District Court, and that personal service could not be made upon the defendant for reasons stated; and that service of summons could be made upon defendant by publication at least once a week for four successive weeks, and it appearing that the residence of the defendant was known to be at the City of San Mateo, California, therefore a copy of the summons and complaint should be deposited in the United States Post-office at Helena, Montana, directed to the said defendant at his

place of residence. On December 6th, thereafter, the defendant filed a motion to quash service of summons, the motion being in the following language:

"Now comes the above named defendant, and appearing specially for the purpose of this motion, and for no other purpose, and not in any way acceding or consenting to the jurisdiction of the court except so far as may be necessary for the purposes of this motion, and moves the court to quash the pretended service of summons in this cause upon the ground and for the reasons following, to-wit:

1. That the said summons has never at all or in any manner been served upon the defendant herein personally in the State and District of Montana, nor has the defendant ever at any time waived service of summons or voluntarily entered his appearance in this cause.

2. That the publication of service herein, wherein and whereby the said summons has been published in a newspaper, does not give the court any jurisdiction over the said defendant nor is such service by publication permissible or in accordance with the rules of procedure in the United States court, nor is the same sanctioned or authorized by any law of the United States, and the said pretended service of summons by publication is wholly and absolutely void under the laws of the United States.

The records show that pursuant to the order of the clerk, publication of summons was made for four successive weeks (—— to ——) as required by the laws of the State, and that a personal service of a copy of the summons and complaint was made upon defendant at San Mateo, California, on December 29th, 1904, by the United States Marshal in and for the Northern District of California, wherein the defendant resides. Sections 637 and 638 Code Civil Procedure, State of Montana.

51 Section 914 of the Revised Statutes of the United States applies only to matters of practice and procedure, and does not appertain to jurisdiction or the mode or manner of obtaining jurisdiction of the person in the courts of the United States in actions brought in the Federal Courts.

Harland v. United Lines Tel. Co., 40 Fed. 308.

The right to attach is conferred by section 915 of the Revised Statutes, which provides that "In common law causes in the Circuit and District Courts the plaintiff shall be entitled to similar remedies, by attachment or other process, against the property of the defendant, which are now provided by the laws of the State in which such court is held for the courts thereof; and such circuit or district courts may, from time to time, by general rules, adopt such state laws as may be in force in the states where they are held in relation to attachments and other process: Provided, that similar preliminary affidavits or proofs, and similar security, as required by such state laws, shall be furnished by the party seeking such attachment or other remedy."

Under the acts of congress of March 3rd, 1875, and August 12th, 1888, amending the act of March 3rd, 1875, the jurisdiction of the

circuit and district courts was more closely defined by the following language of Section 1, * * * "And no civil suit shall be brought before either of said courts against any person by original procest or proceeding in any other district than that wherein he is an inhabitant, but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the District of the residence of either the plaintiff or the defendant."

The limitations in the statute just quoted restrict its operation to civil suits brought before either circuit or district courts against any person "by original process or proceeding."

52 It was held in Perkins vs. Hendryx, *et al.* (1889), 40 Fed. 657, that a federal court does not acquire jurisdiction of a suit removed from a State court by virtue of an attachment made in a State court, where there was no personal service of process on defendant, a resident of another state, and furthermore, that a defendant does not, by appearing in the state court for the purpose of removing the case to the federal court, thereby waive any irregularity as to service of process. The doctrine of that case finds general approval in Black's Dillon on the Removal of Causes, Section 203.

But in Crocker Nat. Bank v. Pagenstecher, *et al.* (1890), 44 Fed. 705, the court distinguished the cases cited in the opinion of Judge Colt in Perkins v. Hendryk, *et al. supra*, by drawing attention to the fact that they were all cases in which the action was originally brought in the circuit court, and were not cases removed to the circuit court. In Richmond v. Brookings, (1891), 48 Fed. 241, the case of Hendryx v. Perkins was again disapproved of.

In Purdy v. Wallace Muller Co., Limited, 81 Fed. 513, an action was begun in the state court against a non-resident defendant by process of foreign attachment, without personal service, or voluntary submission on the part of the defendant to the jurisdiction of the court. Judge Brown of the United States District Court of Massachusetts, held that custody of *res* being recognized by the Federal Courts as a ground of jurisdiction, as well as personal service of process, a suit begun in a state court by attachment of property, and removed into a federal court, will not be there dismissed for want of jurisdiction because there has been no personal service. The case of Goldey v. Morning News, 156 U. S. 518, is distinguished as

53 one not having involved the consideration of the exception pointed out in the case of Pennoyer v. Neff, 95 U. S. 714, and St. Clair v. Cox, 106 U. S. 353, to the general rule regarding personal service or voluntary submission. "It is obviously not the purpose of the removal statute," says Judge Brown, "to destroy a valid jurisdiction of the state court. Nor is it the purpose to secure to a defendant the right to litigate in the district of his own domicile, since the removal must be to the United States Court for the district wherein the suit was begun."

Tallman v. Baltimore & O. R. Co., 45 Fed. 156.

In Cowlet v. Northern Pacific Railroad Co., 159 U. S. 583, the principle which controls was clearly stated: "The case having been

removed to the federal court upon the defendant's petition, it does not lie in its mouth to claim that the court has no jurisdiction of the case, unless the court from which it was removed had no jurisdiction."

The jurisdiction which the state court acquired by attachment created jurisdiction in the federal court when the action was removed, for the reason that by virtue of the attachment in the state court the property attached was brought into the custody of the federal court.

Has the defendant had notice, or if not, how, and what, notice shall be given to him, so that the federal court may now proceed to render judgment and subject the property attached to the payment of the debt sued upon?

The right of removal, and the removal, are based upon the fact of diverse citizenship. The one court lost and the other acquired jurisdiction on this account. Here defendant has voluntarily interrupted service of summons in the state courts by exercising his right to remove the case to this court. Having based his petition upon the fact that he is a citizen of California, and having given the necessary bond, it ought to follow, that although he appeared in the state court solely to remove the case, and would limit his appearance in this court to an attempt to have the action dismissed from it, yet, by his voluntary act in preventing the full notice contemplated by the state law, by removing the case, relying upon such diverse citizenship, he has given this court jurisdiction of his person, and authorized judgment against him, which will not only subject his property to the payment of the debt involved, but *in personam*. The satisfaction of any judgment rendered in the federal court, against the defendant, must be limited to the proceeds realized from the sale of the property attached, but the judgment is in form against the person.

54

I believe the correct rule to be, that jurisdiction to remove carries with it jurisdiction to proceed, and that where the action was properly instituted in the state court, and attachment was had, and where petitioner relies solely upon a diversity of citizenship for removal, any construction which would allow a suit to be removed merely for the purpose of dismissing it would not be sound.

U. S. v. Ottman, 1st Hughes, 313.
11 Myers Fed. Dec. 1638–1643.
Sayles v. Northwestern Ins. Co., 21 Fed. cases, p. 608.
Tootle v. Coleman, 107 Fed., 44.
Elliott v. Shuler, 50 Fed., 454.

In the argument of the learned counsel for the plaintiff, while he expressed confidence in the position that by removing the case the jurisdiction of this court attached to the person, as well as to the property of the defendant, he also suggested that constructive service, as provided by the laws of the state, was authorized in the Federal courts under Section 914; and that service of summons by publication, and by serving a copy of the complaint and the summons upon the defendant had been made in case it might be decided

that these steps were necessary. But as I believe that the acts of the defendant have given jurisdiction of his person, and authorize judgment against him, to the extent indicated, the additional steps had by publication of summons and the service of a copy thereof and of the complaint, though pursued by plaintiff, were not essential.

The motion to quash is overruled.

WM. H. HUNT, Judge.

55 (Endorsed:) Title of Court and Cause. Memorandum Opinion on Motion to Quash Summons. Filed March 20, 1905. Geo. W. Sproule, Clerk.

56 And thereafter to-wit: on the 29th day of March, 1905 a Judgment was duly entered herein which said Judgment is of record as follows, to-wit:

57 In the Circuit Court of the United States, Ninth Circuit, District of Montana.

P. O. WELLS, Plaintiff,
vs.
CHARLES W. CLARK, Defendant. } Judgment.

Be it remembered, that this cause came on to be heard by the court, Honorable William H. Hunt, Judge, presiding, on the 29th day of March, 1905, upon the motion of plaintiff for judgment by default, when the following facts are found by the court, the same appearing by the papers on file, to-wit:

The plaintiff filed his complaint in the district court of Lewis & Clarke County, State of Montana, on the 20th day of September, 1904; that on the same day summons was duly issued out of said district court by the clerk of the court, under the seal of the court, and placed in the hands of the sheriff of said Lewis & Clarke County, and was by him returned on the 20th day of September, 1904; that after due search and diligent inquiry he was unable to find the defendant, Charles W. Clarke, within his said county; that thereafter, to-wit, on the 20th day of September, 1904, plaintiff made and filed in the said District court an affidavit of a writ of attachment; that on the same date plaintiff executed, with an approved surety, an undertaking on attachment, and the same was approved and filed on the 20th day of September, 1904; and that a writ of attachment was duly issued out of said district court by the clerk of the court under the seal of the court, and was placed in the hands of

58 the sheriff of Silver Bow County, State of Montana, and that said sheriff thereafter, to-wit, on the 23rd day of September, 1904, duly returned said writ to the said district court, executed by levying the same upon all the right, title and interest of the defendant, Charles W. Clark, in and to the following described real estate, to-wit:

Lots nine (9) and ten (10), block twenty-one (21) of the original townsite of Butte, Silver Bow County, Montana, and all buildings and improvements thereon.

That thereafter, to-wit, on the 15th day of October, 1904 the defendant filed his petition in the aforesaid district Court for the removal of the said cause to the United States Circuit Court for the District of Montana,—appearing specially for that purpose; that thereafter, to-wit, on the 18th day of October, 1904, the said defendant duly executed and filed in said district court a bond for the removal of said cause, as required by law, that thereafter the said district court made and entered an order that said cause be removed to the Circuit Court of the United States, sitting at Butte City, that the record in said cause was duly filed in the Circuit Court of the United States, under the provisions of said order; that thereafter plaintiff appeared in the United States Circuit Court, and N. W. McConnell of counsel for plaintiff made and filed his affidavit on the third day of November, 1904, for publication of summons as required by the laws of the State of Montana, in causes against non-resident defendants whose property has been attached in the State; that thereafter the clerk of the said United States Circuit Court made and entered the order for said publication; that said publication was duly made for four successive weeks, as required by the laws of the State in such cases, and affidavit of publication made thereafter, that said publication had been made for four consecutive weeks in the Helena Independent, a daily newspaper
59 published in the City of Helena, commencing on the 4th day of November, 1904, and ending on the 25th day of the same month; that on the same day, to-wit, the 3rd day of November, 1904, the clerk of the said United States Circuit Court duly mailed to the defendant, at the place of his residence, in San Mateo, California, a copy of the summons in this cause, and a certified copy of the complaint attached thereto; that thereafter, the United States Marshal for the Northern district of California, duly served, personally, upon defendant at his residence in San Mateo, California, a copy of summons and of the complaint in this cause, on the 29th day of December, 1904; that on the 6th day of December, 1904 the defendant filed his motion in said circuit court to quash the service of suommons in said cause; that on the 9th day of March, 1905 said motion was overruled, the court holding that the so-called special appearance for the removal hereinabove recited, was an absolute and unqualified submission of his person to the jurisdiction of this court by the defendant. The defendant claiming to make further defense in this cause it is ordered upon the motion of counsel for plaintiff, that the default of the defendant be, and it is hereby entered.

Be it further remembered, this cause came on to be further heard by the court upon said motion for judgment by default, and it appeared that defendant was indebted to plaintiff, as evidenced by a promissory note, executed at Helena, Montana December, 28th, 1903, for twenty-five hundred dollars ($2500.00) due sixty days from date, with interest at the rate of six per cent. (6 %) per annum from date, made payable to the Union Bank & Trust Company of Helena, Montana, and by it transferred to the plaintiff, together with a reasonable attorney's fee, amounting with interest to the sum of two

thousand six hundred and eighty-seven — and sixty five cents ($2,687.65) and two hundred and fifty dollars ($250.00) attor-
60 ney's fees, which the court adjudges to be a reasonable compensation for said attorneys, making a total of two thousand nine hundred and thirty-seven dollars and sixty-five cents ($2,937.65).

It is therefore Ordered, adjudged and decreed, that the plaintiff recover from the defendant the said sum of two thousand, nine hundred and thirty seven dollars and sixty-five cents ($2,937.65) and costs of suit, taxed at twenty eight 80/100 dollars ($28.80)

WILLIAM H. HUNT, Judge.

Entered March 29th, 1905.

GEO. W. SPROULE, Clerk.

Attest: A true copy of Judgment as entered.

GEO. W. SPROULE, Clerk.

Endorsed; title of court and cause: Judgment Filed and entered Mar. 29, 1905 Geo. W. Sproule, Clerk.

61 Circuit Court of the United States, Ninth Circuit, District of Montana.

P. O. WELLS, Plaintiff,
vs.
CHAS. W. CLARK, Defendant.

I, G. W. Sproule, Clerk of the above named court, do hereby certify that the foregoing papers hereto annexed constitute the Judgment Roll in the above entitled matter.

Witness my hand and the seal of said Court this 29th day of March, 1905.

GEO. W. SPROULE, Clerk,
By F. H. DRAKE, Deputy Clerk.

[SEAL.]

Endorsed; title of court and cause: Judgment Roll. Filed and entered March 29th, 1905 Geo. W. Sproule, Clerk by F. H. Drake, Deputy Clerk.

62 And thereafter, to-wit, on the 29th day of March, 1905, defendant filed his Bill of Exceptions herein, which was signed, settled and allowed, March 29th, 1905, being as follows, to-wit:

63 In the Circuit Court of the United States, Ninth Circuit, District of Montana.

P. O. WELLS, Plaintiff,
vs.
CHARLES W. CLARK, Defendant.
} Bill of Exceptions.

Be it remembered; that the plaintiff commenced this action by filing in the District Court of the first Judicial District of the State

of Montana, in and for the county of Lewis & Clarke, on the 20th day of September, 1904, his complaint in this action, which said complaint is in words and figures as follows, to-wit:

64 In the District Court of the First Judicial District of the State of Montana, in and for the County of Lewis & Clarke.

P. O. WELLS, Plaintiff,
vs.
CHARLES W. CLARK, Defendant. } Complaint.

The plaintiff in the above entitled action, complaining of the defendant in said action, alleges:

I. That on the 28th day of December, 1903, at the City of Helena, County of Lewis & Clarke, State of Montana, the said defendant, Charles W. Clark, made a certain promissory note in writing, bearing date on said day, which said promissory note is in words and figures as follows, to-wit:

$2500.00. HELENA, MONTANA, December 28, 1903.

Sixty days after date I promise to pay to the Union Bank and Trust Company Two Thousand Five Hundred and 00/100 Dollars value received, payable at the Union Bank and Trust Company, with interest at the rate of 6 per cent. per annum from date until paid. In case of suit hereon the maker agrees to pay a reasonable attorney's fee.

CHARLES W. CLARK.

No. 289.
Due 2-26-'04.
Endorsed: Pay to the order of P. O. Wells. Union Bank and Trust Co. By Frank Bogart, Cashier.

65 and then and there delivered the said promissory note to the Union Bank and Trust Company, a corporation organized under the laws of the State of Montana, and doing business in the City of Helena, Montana, and that said Union Bank & Trust Company, on the 19th day of September, 1904, duly endorsed, assigned and delivered said promissory note to the plaintiff herein.

II. That the said plaintiff is now the lawful owner and holder of said promissory note.

III. That there is now due and unpaid to the said plaintiff on said promissory note the sum of Two Thousand Five Hundred ($2500.00) Dollars, lawful money of the United States, and interest thereon at the rate of Six per cent per annum from the date of said note, to-wit: the 28th day of December, 1903.

IV. That said note provides the payment of reasonable attorney's fees, and that the sum of Two Hundred and Fifty ($250) Dollars is a reasonable attorney's fee.

Wherefore the Plaintiff pray- Judgment against the Defendant for the sum of $2500.00, lawful money of the United States, with in-

terest thereon at the rate of six per cent. per annum from December 28th, 1903; also the sum of $250.00 attorney's fee; also costs of suit.

McCONNELL & McCONNELL,
Attorneys for Plaintiff.

STATE OF MONTANA, } ss:
Lewis & Clarke County, }

Personally appeared before me the undersigned, a Notary Public in and for said county and State, P. O. Wells, who being duly sworn says: That he is the plaintiff in the above entitled action; that he has heard read the foregoing complaint and knows the contents thereof; that as to those matters alleged of his own knewledge it is true, and as to those matters alleged upon information and belief he believes it to be true.

P. O. WELLS.

66 Subscribed and sworn to before me this the 20th day of September, 1904.

[SEAL.] JOSEPH W. CHIVERS,
Notary Public in and for said County and State.

No. 5884 District Court First Judicial District Lewis and Clarke County Montana. P. O. Wells, Plaintiff vs. Charles W. Clark, Defendant. Complaint. Filed Sept. 20th, 1904 Finley McRae Clerk by William T. Condon, Deputy Clerk. McConnell & McConnell, Attorneys for Plaintiff.

That on the 20th day of September, 1904, summons was issued out of said clerk's office and delivered to the sheriff of Lewis and Clarke County for service, and thereafter the said sheriff of Lewis & Clarke County filed the said summons in said clerk's office with his return thereon endorsed, which said summons and return of the sheriff thereon is in words and figures, as follows, to-wit:

67 In the District Court of the First Judicial District of the State of Montana, in and for the County of Lewis & Clarke.

P. O. WELLS, Plaintiff,
vs.
CHARLES W. CLARK, Defendant.

The State of Montana to the above named defendant, Greeting:

You are hereby summoned to answer the complaint in this action which is filed in the office of the Clerk of this Court, a copy of which is herewith served upon you, and to file your answer and serve a copy thereof upon the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service, and in case of your failure to appear or answer, Judgment will be taken against you by default for the relief demanded in the Compalint.

Witness my hand and the seal of said Court, this 20th day of September, 1904.

[SEAL.]

FINLAY McRAE, Clerk,
By WILLIAM T. CONDON,
Deputy Clerk.

68 STATE OF MONTANA, County of Lewis & Clarke, } ss:

Office of the Sheriff.

I hereby certify, that I received the within summons on the 20th day of September, A. D. 1904, and that after due search and diligent inquiry I have been unable to find Charles W. Clarke the within named defendant in Lewis & Clarke County. Dated Helena, Montana, September 22nd, 1904.

JEFF O'CONNELL, Sheriff,
By WM. H. CURTIS,
Under Sheriff.

Endorsed: No. 5884 In the District Court of the State of Montana in and for the County of Lewis and Clarke P. O. Wells, Plaintiff vs. Charles W. Clark, Defendant. Summons Filed September 22nd, 1904 Finlay McRae, Clerk by William T. Condon, Deputy Clerk. McConnell & McConnell, attorneys for plaintiff.

69 That on the 20th day of September, 1904, plaintiff filed in said clerk's office an affidavit of attachment, in words and figures following, to-wit:

70 In the District Court of the First Judicial District of the State of Montana in and for the County of Lewis & Clarke.

P. O. WELLS, Plaintiff,
vs.
CHARLES W. CLARK, Defendant. } Affidavit for Attachment.

STATE OF MONTANA, Lewis & Clarke County, } ss:

Personally appeared before the undersigned, a Notary Public in and for said County and State P. O. Wells, who being first duly sworn says: That he is the plaintiff in the above entitled action; that the defendant in said action is indebted to him in the sum of twenty-five hundred dollars, lawful money of the United States, with interest thereon from the 28th day of December, 1903, over and above all legal set-offs and counter claims upon an express contract for the direct payment of money to-wit: upon a promissory note made by the defendant to the Union Bank & Trust Company, of Helena, Montana, and by said bank duly assigned to him, on the 19th day of September, 1904 that the same is now due and that payment of the same is not secured by any mortgage, lien or pledge

upon real or personal property. That the attachment is not sought and the action is not prosecuted to hinder, delay or defraud any creditor of the defendant.

P. O. WELLS.

71 Subscribed and sworn to before me this 20th day of September 1904.

JOSEPH W. CHIVERS,
Notary Public in and for said County and State.

Endorsed: No. 5884. District Court First Judicial District Lewis & Clark County Montana. P. O. Wells, Plaintiff vs. Charles W. Clark Defendant. Affidavit Filed Sept. 20th, 1904 Finlay McRae, Clerk By William T. Condon, Deputy Clerk. McConnell & McConnell Attorneys for Plaintiff.

On the 20th day of September, 1904, the plaintiff executed a bond on attachment and filed the same with the clerk of the District Court.

72 In the District Court of the First Judicial District of the State of Montana, in and for the County of Lewis & Clarke.

P. O. WELLS, Plaintiff,
vs.
CHARLES W. CLARK, Defendant,
} Undertaking on Attachment.

Whereas, the above named plaintiff has commenced, or is about to commence an action in the District Court of the First Judicial District of the State of Montana in and for the County of Lewis & Clarke, against the above named defendant on a contract for the direct payment of money, claiming that there is due to the said plaintiff from the said defendant the sum of Twenty-five Hundred Dollars, lawful money of the United States, besides interest, attorneys fees and is about to apply for an attachment against the property of the said defendant as security for the satisfaction of any judgment that may be recovered therein.

Now therefore, the undersigned, the United States Fidelity and Guaranty Company of Baltimore, Maryland, in consideration of the premises and of the said attachment, does undertake, in the sum of Twenty-five hundred dollars, and promise to the effect that if the said defendant recover judgment, or if the court shall finally decide that the plaintiff is not entitled to an attachment in said action, the said plaintiff will pay all costs that may be awarded to the said defendant and all damages which he may sustain by reason of
73 the issuing out of the attachment, not exceeding the sum of Twenty-five Hundred Dollars.

Witness our hands and seals, this 20th day of Sept. 1904.

P. O. WELLS. [SEAL.]
THE UNITED STATES FIDELITY
AND GUARANTY CO. [SEAL.]
FRANK BOGART, Attorney in Fact. [SEAL.]

[SEAL.]

STATE OF MONTANA, } ss.
County of ——, }

—— —— and —— —— whose names are subscribed as the sureties to the above undertaking, being severally duly sworn, each for himself says that he is responsible and a householder or freeholder within the State of Montana, and that he is worth the sum specified in the above undertaking over and above all his just debts and liabilities, exclusive of property exempt from execution.

Subscribed and sworn to before me this — day of — 189–.

—— ——,
Notary Public in and for — County, Montana.

Endorsed: No. 5884. In the District Court Judicial District County of — P. O. Wells, Plaintiff vs. Charles W. Clark, 74 Defendant Undertaking on Attachment. Approved and filed this 20th day of Sept. 1904 Finlay McRae Clerk By William P. Condon, Deputy Clerk McConnell & McConnell Attorney for Plaintiff Recorded in Book 2, Undertakings on Attachment page 158.

75 That on the 20th day of September, 1904 a writ of attachment was duly issued out of the said clerk's office, directed to the sheriff of Silver Bow County, Montana, and thereafter, on the said 24th day of September, 1904, the said sheriff of said Silver Bow County, Montana, filed the said writ of attachment with his return thereon, in the office of said clerk, which said writ of attachment and return of sheriff is in words and figures following, to-wit:

76 In the District Court of the First Judicial District of the State of Montana in and for the County of Lewis & Clarke.

P. O. WELLS, Plaintiff,
vs.
CHARLES W. CLARK, Defendant. } Writ of Attachment.

The State of Montana to the Sheriff of Silver Bow County, Greeting:

Whereas, the above entitled action was commenced in the District Court of the First Judicial District of the State of Montana, in and for the County of Lewis & Clarke, by the plaintiff in said action, to recover from the defendant in said action the sum of Twenty-five hundred Dollars, lawful money of the United States, besides interest at the rate of six per cent. per annum from the 23rd day of December, A. D. 1903 attorneys' fees and costs of suit, and the necessary affidavit and undertaking having been filed, as required by law.

Now, we do therefore command you the said sheriff, that you attach and safely keep all the property of the said defendant within your said county, not exempt from execution, or so much thereof as may be sufficient to satisfy said plaintiff's demand, as above mentioned, unless the said defendant give you security by the undertaking of at least two sufficient sureties, in an amount sufficient to sat-

isfy such demand, besides costs, or in an amount equal to the value of the property which has been or is about to be attached, in
77 which case you will take such undertaking. And hereof make due and legal service and return.

Witness the Honorable J. M. Clements, Judge of the said District Court, this 20th day of Sept. A. D. 1904.

Attest my hand and the seal of said Court the day and year last above written.

FINLAY McRAE, Clerk,
By WILLIAM T. CONDON,
Deputy Clerk.

[SEAL.]

Endorsed: No. 5884 District Court First Judicial District, County of Lewis and Clarke, Montana. P. O. Wells, Plaintiff vs. Charles W. Clark, Defendant. Writ on Attachment. Filed this 24th day of Sept. A. D. 1904 Finlay McRae, Clerk by John E. Stuart, Deputy Clerk. McConnell & McConnell Attorneys for plaintiff.

78 STATE OF MONTANA, } ss:
County of Silver Bow, Office of the Sheriff, }

I do hereby certify, That I received the within writ of attachment on the 21st day of Sept. A. D. 1904, and by virtue thereof, I did, on the 22nd day of Sept. A. D. 1904 attach all the right, title or interest of the defendant Chas. W. Clark and standing on the records of Silver Bow County in the name of Katherine Q. R. Clark, by filing with the County Clerk and Recorder of Silver Bow County, Montana, a copy of the within writ, together with a description of the property attached, and a notice that it is attached. Description:

All the right, title, and interest of the defendant Chas. W. Clark, in and to the following real estate, to-wit: Lots nine (9) and Ten (10) in Block Twenty-one (21) of the Original Townsite of Butte, Silver Bow County, Montana, and all the buildings and improvements thereon, standing in the name of Katherine Q. R. Clark on the records of the Recorder's Office in said County.

I further certify, that I served a true copy of the within writ together with a description of the property attached on A. J. Shores the present occupant of the above described premises, on the 22nd day of Sept. A. D. 1904. I hereby return said writ of attachment without further service.

Dated this 23rd day of Sept. A. D. 1904.

JOHN J. QUINN, Sheriff,
By JNO. S. WYMAN, Deputy.

79 That, thereafter, on the 15th day of October, 1904, defendant's petition for removal, bond on removal and order of removal to the United States Circuit Court for the District of Montana, at Butte City, Montana, were duly filed in said cause, and are as follows, to-wit:

80 In the District Court of the First Judicial -istrict of the State of Montana, in and for the County of Lewis & Clark.

P. O. WELLS, Plaintiff,
vs.
CHARLES W. CLARK, Defendant.

Petition for Removal to Circuit Court of the United States for the District of Montana.

Your petitioner, Charles W. Clark, appearing specially for this purpose and no other, and waiving no right to object to the jurisdiction of the Court over his person or property respectfully shows to this honorable Court:

That he is the defendant in this suit, which is of a Civil nature, and that the matter and amount in dispute in this cause exceeds the sum or value of two thousand dollars, exclusive of interest and costs; that the controversy herein is between citizens of different states; that the plaintiff P. O. Wells, was at the time of the commencement of this suit, and is a citizen of the State of Montana. That your petitioner Charles W. Clark, was at the time of the commencement of this suit, and still is, a citizen of the State of California, and of no other State, residing in San Mateo, California, and is not a resident of the State of Montana. That your petitioner desires to remove this suit before a trial thereof to the next United States Circuit Court to be held in the District of Montana,
81 and your petitioner offers herewith good and sufficient surety for his entering in the Circuit Court of the United States for the District of Montana on the first day of its next session to be held at Butte, Montana, a copy of the record in this suit, and for the payment of all costs that may be awarded by the said Circuit Court of the United States if said court shall hold that this suit is wrongfully and improperly removed thereto.

And your petitioner therefore prays that the said surety and bond may be accepted; but that said suit may be removed into the next Circuit Court of the United States to be held at Butte in the District of Montana pursuant to the statutes of the United States in such cases made and provided and that no further proceedings be had herein in this Court.

And he will ever pray.

W. M. BICKFORD,
GEORGE F. SHELTON,
Attorneys for Petitioner Charles W. Clark.

STATE OF MONTANA,
County of Silver Bow, } ss:

George F. Shelton, being first duly sworn, deposes and says:

That he is one of the attorneys for the petitioner in the above entitled action; that he makes this affidavit of verification for the reason that said petitioner is not within the County of Silver Bow,

State of Montana, where affiant resides, and cannot make this affidavit for himself. That he has read the foregoing petition, and knows the contents thereof, and that the same is true according to the best knowledge, information and belief of affiant.

GEORGE F. SHELTON.

Subscribed and sworn to before me this 15th day of October 1904.

82 [SEAL.] A. W. DEVITT,
Notary Public in and for Silver Bow County, Montana.

Endorsed: No. 5884. In the District Court of the County of Lewis & Clarke State of Montana. P. O. Wells, Plaintiff vs. Charles W. Clark, Defendant. Petition for removal to Circuit Court of the United States for The District of Montana. Filed Oct. 18th, 1904 Finlay McRae, Clerk by Rae C. Clements Dep. Clk.

83 In the District Court of the First Judicial District of the State of Montana in and for the County of Lewis & Clarke.

P. O. WELLS, Plaintiff,
vs.
CHARLES W. CLARK, Defendant.

Bond on Removal.

Know all men by these presents, that the undersigned, J. K. Heslet and A. H. Wethy, of the City of Butte, County of Silver Bow, State of Montana, are held and stand firmly bound unto P. O. Wells, in the penal sum of three hundred dollars, for payment whereof, well and truly to be made unto said P. O. Wells, his heirs, executors, administrators and assigns, we bind ourselves, our heirs and representatives and assigns, jointly and severally, firmly by these presents.

Upon the condition, nevertheless, that whereas, the said Charles W. Clark, has filed his petition in District Court of the First Judicial District of the State of Montana, in and for the County of Lewis & Clarke, for the removal of a certain cause therein pending, wherein the said P. O. Wells, is plaintiff and the said Charles W. Clark is defendant, to the Circuit Court of the United States for the District of Montana:

Now if the said Charles W. Clark shall enter in the said Circuit Court of the United States on the first day — its next session to be held at Butte, Montana, a copy of the record in said suit, shall well, and truly pay all costs that may be awarded by the said Cir-
84 cuit Court of the United States, if said Court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation to be void, otherwise, to remain in full force and virtue.

In witness whereof, we have hereunto set our hands and seals this 15th day of October, 1904.

J. K. HESLET.
A. H. WETHY.

STATE OF MONTANA, }
County of Silver Bow, } ss:

J. K. Heslet and A. H. Wethy being first severally duly sworn, deposes and says; that they are residents and householders in the county of Silver Bow, State of Montana; that they are worth the amount specified in the above undertaking as the penalty thereof over and above *his* just debts in property by law exempt from execution.

J. K. HESLET.
A. H. WETHY.

Subscribed and sworn to before me this 15th day of October, 1904.
[SEAL.] A. W. DEVITT,
Notary Public in and for Silver Bow County, Montana.

Endorsed: No. 5584. In the District Court of Lewis & Clarke County, State of Montana P. O. Wells, plaintiff vs. Charles W. Clark, defendant. Bond on Removal. The within bond is hereby approved this 18th day of October 1904. J. M. Clements Judge. Filed Oct. 18th, 1904 Finlay McRae, Clerk by Ræ C. Clements, Dept. Cl'k.

85 District Court of the First Judicial District, State of Montana, in and for Lewis and Clarke County, Department No. 2, October 18th, 1904.

Title of Cause.

No. 5884.

In this cause the defendant herein having within the time provided by law filed his petition for removal of this cause to the Circuit Court of the United States for the District of Montana, and having at the same time offered his bond in the sum of three hundred dollars with J. K. Heslet and A. H. Wethey as good and sufficient sureties pursuant to the statute, conditioned according to law; court this day hereby accepts said petition, and ordered that this cause be removed for trial to the next Circuit Court of the United States for the District of Montana to be held at Butte, Silver Bow County, pursuant to the statutes of the United States, and that all other proceedings in this Court be stayed.

J. M. CLEMENTS, Judge.

86 In the District Court of the First Judicial District of the State of Montana in and for the County of Lewis & Clarke.

P. O. WELLS, Plaintiff,
vs.
CHARLES W. CLARK, Defendant.

Order for Removal.

The defendant herein having within the time provided by law filed his petition for removal of this cause to the Circuit Court of

the United States for the District of Montana and having at the same time offered his bond in the sum of three hundred dollars with J. K. Heslet and A. H. Wethy as good and sufficient sureties pursuant to the statute, conditioned according to law.

Now therefore, this court does hereby accept and approve said bond, and accept said petition, and it is ordered that this cause be removed for trial to the next Circuit Court of the United States for the District of Montana, to be held at Butte, Silver Bow County, pursuant to the Statutes of the United States, and that all other proceedings in this Court be stayed.

Dated this 18th day of October, 1904.

J. M. CLEMENTS, Judge.

Endorsed: No. 5884. In the District Court of the State of Montana. P. O. Wells, Plaintiff vs. Charles W. Clark, Defendant. Order for Removal. Filed Oct. 18th, 1904 Finlay McRae, Clerk by Rea C. Clements, Deputy Cl'k.

87 That thereafter, on the 3rd day of November, 1904, in the United States Circuit Court for the district of Montana, the plaintiff filed his affidavit for publication of summons in words and figures following, to-wit:

88 In the Circuit Court of the United States, Ninth Circuit, District of Montana.

P. O. WELLS, Plaintiff,
vs.
CHARLES W. CLARK, Defendant. } Affidavit.

UNITED STATES OF AMERICA,
State of Montana, Lewis & Clarke County, } ss:

N. W. McConnell being duly sworn says: That he is of counsel for the plaintiff in the above entitled action; that the complaint in said action was filed with the Clerk of the District Court of the First Judicial District of the State of Montana, on the 20th day of September, 1904, and summons thereon issued; that said action is brought to recover the sum of $2500.00 due and unpaid from said defendant Charles W. Clark, to the plaintiff, P. O. Wells, upon a promissory note made by said defendant and dated on the 28th day of December, 1903, payable in sixty days after date to the Union Bank and Trust Company, and by it assigned to plaintiff, and interest from date at the rate of six per cent. per annum until paid, and reasonable attorneys' fees. The cause of action is fully set forth in the verified complaint on file herein. That said defendant resides out of this State and cannot, after due diligence, be found therein, and this affiant, in support thereof, states the following facts and circumstances;—

89 George F. Shelton, the attorney for the defendant, has filed a petition (appearing specially for that purpose) for the purpose of removing this case from the State District Court to the

United States Circuit Court, and in said petition, verified by said attorney, it is alleged that the defendant is a resident of San Mateo, California; and affiant further says that he has conversed with another one of the defendant's attorneys, W. M. Bickford, who stated to him that the defendant's — was in said town in the State of California. Affiant further states of his own knowledge that he saw the defendant in the State of Montana, in the City of Helena, in the month of May last, at the time process was served upon him in another suit pending in this court, and that shortly afterwards said defendant left this State and went either to Jerome, in the Territory of Arizona, or to the State of California, and that he has never seen nor heard of the defendant being in this State since. Affiant further states that he has made diligent inquiry to find said defendant and cannot, after due diligence, find him within this State. Affiant further states that a cause of action exists against the defendant in respect of which the service of summons is to be made, and that he is a necessary and proper party to the action.

Affiant further states that personal service of said summons cannot be had on said defendant, Charles W. Clark, and prays for an order that service of summons in the case may be made by publication thereof.

N. W. McCONNELL.

Subscribed and sworn to before me this the 3rd day of November 1904.

LOUIS PENWELL,
Notary Public in and for Lewis & Clark County,
State of Montana.

Endorsed: Title of court and cause. Affidavit. Filed and Entered Nov. 3, 1904 Geo. W. Sproule, Clerk.

90 That on the 3rd day of November, 1904, an order for the publication of summons was made by the clerk of the United States Circuit Court for the District of Montana, in words and figures following, to-wit:

91 In the Circuit Court of the United States, Ninth Circuit, District of Montana.

P. O. WELLS, Plaintiff,
vs.
CHARLES W. CLARK, Defendant. } Order.

Upon reading and filing the affidavit of N. W. McConnell and it satisfactorily appearing therefrom that the defendant Charles W. Clark, has departed from and resides out of this State and cannot, after due diligence, be found within this State, and it also appearing from the complaint herein, duly verified by the plaintiff, that a good cause of action exists in this action in favor of the plaintiff therein and against the defendant, and that the defendant, Charles W. Clark, is a necessary and proper party defendant thereto, and it

further appearing that a summons has been duly issued out of the State District Court in this action, and that personal service of the same cannot be made upon the said defendant, Charles W. Clark, for the reasons hereinbefore, and by the said affidavit, made to appear; On motion of McConnell & McConnell, attorneys for the plaintiff;

It is Ordered that service of summons in this action be made upon the defendant, Charles W. Clark, by publication thereof in the Daily Independent, a newspaper published at the City of Helena, County of Lewis & Clarke, State of Montana, hereby designated as
92 the Newspaper most likely to reach the said defendant; that such publication be made at least once a week for four successive weeks.

And it further in like manner satisfactorily appearing to me that the residence of the said defendant is known to be at the City of San Mateo, State of California, it is Ordered and Directed that a copy of the summons and complaint in this suit be forthwith deposited in the United States Post Office at the City of Helena, Montana, post paid, and directed to the said defendant at his said place of residence.

GEO. W. SPROULE,
Clerk of the United States Circuit Court in and
for the Ninth Circuit, District of Montana.

Endorsed: Title of court and cause Order Filed and entered Nov. 3rd, 1904 Geo. W. Sproule, Clerk.

93 That thereafter, on the 30th day of November, 1904 there was filed in the office of the clerk of the United States Circuit Court for the district of Montana, proof of publication of summons, in words and figures following, to-wit:

94 UNITED STATES OF AMERICA:

Circuit Court of the United States, Ninth Circuit, District of Montana.

P. O. WELLS, Plaintiff,
vs.
CHARLES W. CLARK, Defendant.

Action Brought in the said Circuit Court and the Complaint Filed in the Office of the Clerk of said Circuit Court, in the City of Helena, County of Lewis & Clarke.

The President of the United States of America to the above named defendant, Charles W. Clark, Greeting:

You are hereby summoned to answer the complaint in this action which is filed in the office of the Clerk of this Court, a copy of which is hereby served upon you, and to file your answer and serve a copy thereof upon the plaintiff's attorney within twenty days after the service of this summons exclusive of the day of service; and in

case of your failure to appear or answer, judgment will be taken against you by default, for the relief demanded in the complaint.

This action is brought for the recovery of a judgment of $2500.00 with interest at the rate of six per cent. per annum from December 28th, 1903, and costs of suit, and $250.00 counsel fees, upon a promissory note for said sum of $2500.00 dated Dec. 28th, 1903, due 60 days after date, executed by the defendant to the Union Bank & Trust Company and by it transferred to the plaintiff.

Witness the Honorable Melville W. Fuller Chief Justice of the United States this 3rd day November in the year of our Lord one thousand nine hundred and four and of our Independence the 129th.

GEO. W. SPROULE, Clerk.

Endorsed: Summons. McConnel- & McConnell Attorneys for plaintiff First publication Nov. 4–1904.

95 Affidavit of Publication.

STATE OF MONTANA, }
County of Lewis & Clarke. }

E. B. Kennedy being duly sworn, deposes and says: That he is principle clerk of the Helena Daily Independent, a newspaper of general circulation, printed and published in Helena, Lewis & Clarke County, Montana, that the notice hereunto annexed: Summons—P. O. Wells vs. Charles W. Clark has been correctly published in the regular and entire issue of every number of said paper for four consecutive weeks commencing on the 4th day of November, 1904 and ending on the 25th day of November, 1904.

[SEAL.] E. B. KENNEDY.

Subscribed and sworn to this 25th day of Nov. A. D. 1904.

RAY CHURCH,
Notary Public in and for Lewis & Clarke County,
State of Montana.

Endorsed: Title of court and cause Proof of Publication Filed and Entered Nov. 30th, 1904 Geo. W. Sproule, Clerk.

96 That thereafter, on the 3rd day of November, 1904, the Clerk of the United States Circuit Court mailed to the defendant a copy of complaint and summons at San Mateo, California, the place of his residence, and filed in his office an affidavit of such mailing of the copy of summons and complaint.

97 In the Circuit Court of the United States, Ninth Circuit, District of Montana.

P. O. WELLS, Plaintiff, }
vs. }
CHARLES W. CLARK, Defendant. }

UNITED STATES OF AMERICA, }
District of Montana, } ss:

I Geo. W. Sproule, being duly sworn depose and say That I am the duly appointed, qualified and acting clerk of the United States

Circuit Court for the District of Montana, that as such clerk on or about November 3rd, 1904, I deposited in the Post Office at Helena, Montana, a copy of the Summons together with a certified copy of the complaint attached in case entitled P. O. Wells, vs. Chas. W. Clark in an envelope postage fully paid addressed to the defendant Charles W. Clark at San Mateo, California.

GEO. W. SPROULE.

Subscribed and sworn to before me this 29th day of March, 1905.

WM. H. HUNT,
U. S. District Judge.

Endorsed: Title of court and cause. Affidavit as to Mailing copy of Summons and Complainant. Filed and entered Mar. 29th, 1905. Geo. W. Sproule, Clerk.

98 That thereafter, on the 6th day of December, 1904, defendant served and filed his motion to quash service of summons herein, which said motion to quash service of summons is in words and figures following, to-wit:

99 In the Circuit Court of the United States, Ninth Circuit, District of Montana.

P. O. WELLS, Plaintiff,
vs.
CHARLES W. CLARK, Defendant.

Motion to Quash Service of Summons.

Now comes the above named defendant, and appearing specially for the purpose of this motion, and for no other purpose, and not in any way acceding or consenting to the jurisdiction of the court except so far as may be necessary for the purposes of this motion, and moves the court to quash the pretended service of summons in this cause upon the grounds and for the reasons following, to-wit:

1. That the said summons has never at all or in any manner been served upon the defendant herein personally in the state and district of Montana, nor has the defendant ever at any time waived service of summons or voluntarily entered his appearance in this cause.

2. That the publication of summons herein, wherein and whereby the said summons has been published in a newspaper, does not give the court any jurisdiction over the said defendant, nor is such service by publication permissible or in accordance with the rules of procedure in the United States Court nor is the same sanctioned or authorized by any law of the United States, and the said pretended service of summons by publication is wholly and ab-

100 solutely void under the laws of the United States.

W. M. BICKFORD,
GEO. F. SHELTON,
Attorneys for Defendant, Appearing Specially for this Motion.

I hereby certify that in my opinion the within and foregoing motion is good in point of law.

GEO. F. SHELTON,
Of Counsel for Defendant, Appearing
Specially for this Motion.

UNITED STATES OF AMERICA,
District of Montana, County of Silver Bow, } ss:

A. W. Devitt, being first duly sworn, deposes and says: That he is a citizen of the United States, over the age of twenty one years, and a resident of Butte, Silver Bow County, Montana: that McConnell & McConnell are the attorneys of record for the plaintiff named in the action mentioned in the attached motion to quash service of summons, and that they reside in the city of Helena, Lewis & Clarke County, State of Montana; that in each of said places there is a United States postoffice, and between said two places there is a regular daily communication by mail; that on the 6th day of December, 1904, deponent served a true copy of the attached motion on said McConnell & McConnell, attorneys for the plaintiff, by depositing said copy of said motion, on said date in the post office at said
city of Butte, Silver Bow County Montana, properly enclosed
101 in a sealed envelope addressed to said McConnell & McConnell, attorneys at Law, at Helena, Montana, and prepaying the postage thereon.

A. W. DEVITT.

Subscribed and sworn to before me this 6th day of December, 1904.

[SEAL.]

WM. C. SIDERKIN,
Notary Public in and for Silver Bow
County, State of Montana.

Endorsed: Title of court and cause Motion to quash service of summons. Filed and entered Dec. 6, 1904 Geo. W. Sproule, Clerk by F. H. Drake, Deputy.

That the summons herein was not served on the defendant otherwise than as above set forth and the said defendant did not voluntarily appear in said cause except specially for the purposes of the motion to quash hereinbefore set forth.

That thereafter, on the 7th day of February, 1905, the said cause came on for hearing before the court upon the said motion of defendant to quash service of summons herein, and the matter was argued by counsel and submitted to the court for adjudication and decision; that thereafter, on the 20th day of March, 1905, the court rendered its decision, and ordered that the motion to quash service of summons in said cause be denied, which said order of court is in words and figures following, to-wit:

102 26th Day of February, Term 1905. U. S. Circuit Court District of Montana, Monday the 20th day of March, 1905.

P. O. WELLS
vs.
CHAS. W. CLARK. } No. 259.

This cause heretofore submitted to the court upon Motion of defendant to quash summons herein came on regularly at this time for the judgment of the court and after due considerations it is

"Ordered that said Motion be and the same hereby is overruled."

To which ruling of court, the defendant then and there duly excepted, and now presents this, his bill of exceptions and asks that the same be signed, settled and allowed.

W. M. BICKFORD,
GEORGE F. SHELTON,
Attorneys for Defendant.

Service of the within and foregoing bill of exceptions accepted and copy received this 29th day of March, 1905.

McCONNELL & McCONNELL,
Attorneys for Plaintiff.

I hereby certify that the foregoing bill of exceptions is correct, and that the same is hereby signed, settled and allowed, and ordered filed this 29th day of March, 1905.

WILLIAM H. HUNT, Judge.

Endorsed: Title of court and cause. Bill of exceptions. Filed and entered Mar. 29th, 1905. Geo. W. Sproule, Clerk.

103 And thereafter to-wit on the 4th day of April, 1905 a petition for writ of error was duly filed herein which is entered of record as follows, to-wit:

104 In the Circuit Court of the United States, Ninth Circuit, District of Montana.

CHARLES W. CLARK, Plaintiff in Error,
vs.
P. O. WELLS, Defendant in Error. } No. 259. At Law.

And now comes Charles W. Clark, plaintiff herein, and says:

That on or about the 29th day of March, 1905, the circuit court entered a judgment herein in favor of the plaintiff and against this plaintiff, in which judgment and the proceedings had prior thereto in this cause certain errors were committed to the prejudice of this plaintiff, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore, this plaintiff prays that a writ of error may issue in this behalf out of the Supreme Court of the United States for the correction of errors so complained of and that a transcript of the

record, proceedings, and papers in this cause, duly authenticated may be sent to the Supreme Court of the United States.

W. M. BICKFORD,
GEO. F. SHELTON,
Attorneys for Plaintiff in Error.

Endorsed: Title of court and cause. Petition for writ of error. Filed and entered April 4, 1905. Geo. W. Sproule, Clerk.

105 And thereafter to-wit on the 4th day of April, 1905 assignment of Errors was filed herein which said assignment of error is in the words and figures following, to-wit:

106 In the Circuit Court of the United States, Ninth Circuit, District of Montana.

CHARLES W. CLARK, Plaintiff in Error,
vs.
P. O. WELLS, Defendant in Error.
} No. 259. At Law.

Assignment of Errors.

The plaintiff in error in this action, in connection with his petition for a writ of error, makes the following assignment of errors which he avers occurred in said cause, to-wit:

1. The court erred in overruling and denying the motion of plaintiff in error to quash the service of summons herein.

2. The court erred in holding that the appearance of the defendant, Charles W. Clark, in the district court of the Second judicial district of the State of Montana, in and for the county of Silver Bow, for the purpose of removing the said cause from the said district court to the circuit court of the United States, ninth circuit, district of Montana, made such an appearance in said cause as to obviate the necessity of further service of summons upon said defendant, and thereupon gave the circuit court jurisdiction to further proceed in said cause.

3. The court erred in holding that the court could entertain jurisdiction of said cause by publication of summons, and grant relief to the plaintiff in the suit upon service of summons by publication thereof and the mailing of a copy of said summons to the defendant at his residence without the State of Montana.

107 4. The court erred in holding that the fact that a writ of attachment was issued in said cause out of the district court of the second judicial district of the State of Montana, within and for Silver Bow County, prior to the removal of said cause to the circuit court of the United States, ninth circuit, district of Montana, and which was levied upon the real estate of said Charles W. Clark in the county of Silver Bow, State of Montana created such a lien as to constitute said suit one to enforce a legal or equitable lien upon the real or personal property within the district where said suit was brought, and authorized proceedings to obtain jurisdiction of the property of said defendant, Charles W. Clark, by the publication of summons.

5. The court erred in holding that the fact that a writ of attachment issued in said cause out of the district court of the second judicial district of the State of Montana, in and for the county of Silver Bow, prior to the removal of said cause to the circuit court of the United States, ninth circuit, district of Montana, and the levying of the same upon the real estate of said Charles W. Clark in the county of Silver Bow, State of Montana, was the creation of such a lien as to constitute said suit one to enforce a legal or equitable lien upon the real or personal property within the district where such suit is brought, and authorize proceedings to obtain jurisdiction of the property of said defendant, Charles W. Clark; and that the provisions of the Code of Civil Procedure of the State of Montana for the publication of summons were appropriate and applicable to the proceedings in said cause for the purpose of obtaining jurisdiction in the circuit court of the United States, ninth circuit, district of Montana.

6. The court erred in holding that the proceedings authorized by the provisions of the Code of Civil Procedure of the State of
108 Montana relative to the service of summons by publication, were applicable to proceedings in the circuit court of the United States, ninth circuit, district of Montana.

7. The court erred in holding that it had jurisdiction to render judgment against the defendant, Charles W. Clark in favor of the plaintiff in this cause.

Wherefore plaintiff in error in this cause prays that the judgment of the circuit court may be reversed.

W. M. BICKFORD,
GEO. F. SHELTON,
Attorneys for Plaintiff in Error.

Endorsed: Title of court and cause Assignment of errors. Filed and entered April 4th, 1905. Geo. W. Sproule, clerk.

109 And thereafter, to-wit, on the 4th day of April, 1905, a Certificate was duly made and signed herein, which said certificate is as follows:

110 In the Circuit Court of the United States, Ninth Circuit, District of Montana.

P. O. WELLS, Plaintiff,
vs.
CHARLES W. CLARK, Defendant. } No. 259.

Certificate.

I hereby certify that the order in the above entitled case denying the defendant's motion to quash service of summons herein was determined by me as presenting the question of jurisdiction of the court to proceed in said cause further, and that the sole question involved was the question of the jurisdiction of the court to further proceed in said cause and that I determined the question in favor of the jurisdiction of the court.

This certificate is made conformably to the act of Congress of March 3rd, 1891, chapter 517; and the opinion filed herein is made a part of the record and will be certified and sent up as a part of the proceedings, together with this certificate.

Signed and certified this fourth day of April, 1905.

WILLIAM H. HUNT,
District Judge Holding the Circuit Court of the
United States for the District of Montana.

Endorsed: Title of court and cause Certificate Filed and entered April 4th, 1905. Geo. W. Sproule, Clerk.

111 And thereafter to-wit on the 4th day of April, 1905 an order allowing writ of error was duly made and entered herein which said order is entered of record as follows, to-wit:

112 In the Circuit Court of the United States, Ninth Circuit, District of Montana.

CHARLES W. CLARK, Plaintiff in Error,
vs.
P. O. WELLS, Defendant in Error.
} No. —. At Law.

Order Allowing Writ of Error.

This 4th day of April, 1905 comes the plaintiff in error by his attorneys, and files herein and presents to the court his petition praying for the allowance of a writ of error, and an assignment of errors intended to be urged by him, praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the supreme court of the United States, and that such other and further proceedings may be had as are proper in the premises.

On consideration whereof the court does allow the writ of error, upon the plaintiff giving bond according to law in the sum of three hundred dollars ($300.00)

WILLIAM H. HUNT,
Judge of the District Court of the United States
for the District of Montana.

Endorsed: Title of court and cause: Order allowing writ of error. Filed and entered April 4th, 1905 Geo. W. Sproule, clerk.

113 And thereafter to-wit on the 4th day of April, 1905 a bond on writ of error was filed herein which said bond is in the words and figures following, to-wit:

114 In the Circuit Court of the United States, Ninth Circuit, District of Montana.

CHARLES W. CLARK, Plaintiff in Error,
vs.
P. O. WELLS, Defendant in Error.
} No. 259. At Law.

Bond.

Know all men by these presents, that we, Charles W. Clark as principal and Alex. J. Johnston and J. K. Heslet as sureties, are

held and firmly bound unto P. O. Wells in the full and just sum of three hundred ($300.00) dollars, to be paid to the said P. O. Wells, his attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bond ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 4th day of April, in the year of our Lord one thousand nine hundred and five.

Whereas, lately at a circuit court of the United States in a suit depending in said court between P. O. Wells, plaintiff and Charles W. Clark, defendant, a judgment was rendered against the said Charles W. Clark, and the said Charles W. Clark, having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said P. O. Wells, citing and admonishing him to be and appear at a session of the supreme court of the United States, to be holden at the city of Washington, on the 3rd day of June next,

115 Now, the condition of the above obligation is such that if the said Charles W. Clarke shall prosecute the said writ of error to effect, and answer all costs if he fail to make his plea good, then the above obligation to be void, else to remain in full force and virtue.

CHARLES W. CLARK,
By W. M. BICKFORD AND
GEORGE F. SHELTON,
Attorneys. [SEAL.]
ALEX J. JOHNSTON. [SEAL.]
J. K. HESLET. [SEAL.]

Sealed and delivered in the presence of—
GEO. F. SHELTON.
H. C. HOPKINS.

Approved by—
WILLIAM H. HUNT,
District Judge Holding the Circuit Court of the
United States for the District of Montana.

Endorsed: Title of court and cause Bond on writ of error. Filed April 4th, 1905 Geo. W. Sproule, Clerk.

116 And thereafter, to-wit, on the 4th day of April, 1905, a writ of error was issued herein, which said writ is as follows, to-wit;

117 THE UNITED STATES OF AMERICA, ss:

The President of the United States to the Judges of the Circuit Court of the United States for the district of Montana, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said circuit court, before you, between P. O. Wells, plaintiff, and Charles W. Clark, defendant,

a manifest error has happened, to the great damage of the said Charles W. Clark, as by his complaint appears; we, being willing that the error, if any has been, should be duly corrected, and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at the city of Washington on the 3rd day of June next, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 4th day of April, in the year of our Lord one thousand nine hundred and five, and of the Independence of the United States of America the one hundred and twenty-ninth.

{Seal United States Circuit Court, District of Montana, Southern Division, 1892.}

GEO. W. SPROULE,
Clerk of the Circuit Court of the United States,
District of Montana.

Allowed by—
WILLIAM H. HUNT,
Judge of the District Court of the United States
for the District of Montana.

118 The Answer of the Honorable the Circuit Judges of the United States, Ninth Circuit, for the District of Montana, to the Foregoing Writ.

The records and proceedings whereof mention is within made, with all things touching the same, I certify, under the seal of said Circuit Court, to the Supreme Court of the United States, within mentioned, at the day and place within contained, in a certain schedule to this writ annexed as within I am commanded.

By the Court:

[Seal United States Circuit Court, District of Montana, 1890.]

GEO. W. SPROULE, Clerk.

119 [Endorsed:] No. 259 At Law. In the Circuit Court of the United States, Ninth Circuit, District of Montana. Charles W. Clark, Plaintiff in Error, v. P. O. Wells, Defendant in Error. Writ of Error. Filed and Entered Apr. 7 1905 Geo. W. Sproule W. M. Bickford, George F. Shelton, Attorneys for Plaintiff in Error

120 Service of the within Writ of Error accepted at Butte, Montana this 6th day of April 1905.

McCONNELL & McCONNELL,
Attorneys for Plaintiff.

121 And thereafter, to-wit, on the 4th day of April, 1905, a Citation to defendant in error was duly issued herein, which said Citation is as follows, to-wit:

122 THE UNITED STATES OF AMERICA, ss:

To P. O. Wells, Greeting:

You are hereby cited and admonished to be and appear at a supreme court of the United States, to be holden at the city of Washington, on the 3rd day of June next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Montana, wherein Charles W. Clark is plaintiff, and you are the defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned should not be corrected, and speedy justice be done to the parties in that behalf.

Given under my hand at the city of Butte, in the circuit and district above named, this 4th day of April, in the year of our Lord one thousand nine hundred and five.

WILLIAM H. HUNT,
Judge of the District Court of the United
States for the District of Montana.

Service of the within Citation accepted this 6th day of April 1905
McCONNELL & McCONNELL,
Attorneys for Plaintiff.

123 [Endorsed:] No. 259 At Law. In the Circuit Court of the United States, Ninth Circuit, District of Montana. Charles W. Clark, Plaintiff in Error, v. P. O. Wells, Defendant in Error. Citation to Defendant in Error. Filed and entered Apr. 7 1905. Geo. W. Sproule clerk. W. M. Bickford, George F. Shelton, Attorneys for Plaintiff in Error.

124 Clerk's Certificate of Transcript.

UNITED STATES OF AMERICA, } ss:
District of Montana, }

I George W. Sproule, Clerk of the United States Circuit Court for the District of Montana, do hereby certify and return to the Honorable, the Supreme Court of the United States, that the foregoing volume, consisting of 124 pages, numbered consecutively from 1 to 124 is a true and correct transcript of all the pleadings, process, orders, judgment and all proceedings had in said cause, and of the whole thereof, as appears from the original records and files of said court in my possession; and I do further certify and return that I have annexed to said transcript and included within said paging the original citation and writ of error issued in said cause.

I further certify that the costs of the transcript of record amount

to the sum of sixty $\frac{25}{100}$ ($60.\frac{25}{100}$) dollars, and has been paid by the appellant.

In witness whereof, I have hereunto set my hand and affixed the seal of said United States Circuit Court for the District of Montana, at Helena, Montana, this 23 day of May, A. D. 1905.

[Seal United States Circuit Court, District of Montana, 1890.]

GEO. W. SPROULE, Clerk.

Endorsed on cover: File No. 19,795. Montana C. C. U. S. Term No. 293. Charles W. Clark, Plaintiff in Error, vs. P. O. Wells. Filed June 8th, 1905. File No. 19,795.

FILE COPY.

Office Supreme Court U. S.
FILED
MAY 19 1906
JAMES H. McKENNEY,
Clerk.

No. [redacted]42

IN THE

Supreme Court of the United States

OCTOBER TERM, 1905

CHARLES W. CLARK,
Plaintiff in Error,

v.

P. O. WELLS,
Defendant in Error.

Brief for Plaintiff in Error.

W. M. BICKFORD,
GEORGE F. SHELTON,
WILLIAM A. CLARK, JR.,
Counsel for Plaintiff in Error.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1905

CHARLES W. CLARK,
Plaintiff in Error,

v.

P. O. WELLS,
Defendant in Error.

No. 293.

BRIEF FOR PLAINTIFF IN ERROR.

W. M. BICKFORD,
GEORGE F. SHELTON,
WILLIAM A. CLARK, JR.,
Counsel for Plaintiff in Error.

STATEMENT OF FACTS.

This case is here on a writ of error to the Circuit Court of the United States for the District of Montana, under the Act of March 3, 1891, solely for review of a question involving the jurisdiction of the court below. The question of jurisdiction alone has been certified to this court from the Circuit Court for decision. (Record pages 43-44.)

The suit was commenced in the State Court by P. O. Wells, defendant in error, against Charles W. Clark, plaintiff in error, to recover judgment for the sum of twenty-five hundred dollars ($2,500.00), together with interest, costs and attorney fees, alleged to be due on a promissory note.

There was no personal service of summons had in the case. The complaint was filed in the State Court, summons duly issued, and returned with the endorsement of the sheriff thereon that Charles W. Clark, the defendant in said action, could not be found in his county.

Under the Code of Civil Procedure of the State of Montana, an affidavit for attachment and undertaking on attachment were duly filed, and a writ of attachment duly issued, and certain real estate of said Charles W. Clark was attached thereunder, and the return of the sheriff to that effect endorsed upon the writ of attachment, which was filed in said cause.

Thereafter, and upon proceedings had to that end, within the time required by law, the said suit was removed from the State Court to the Circuit Court of the United States for the District of Montana; and, within the time required by law, the record was duly filed in the office of the Clerk of the Circuit Court of the United States for the District of Montana.

In the petition for the removal of the cause, said Charles W. Clark appeared specially for the purpose of asking for the removal of the cause, and for no other purpose, and reserving the right to object to the jurisdiction over his person or property.

After the filing of the record in the Circuit Court of the

United States for the District of Montana, counsel for the plaintiff, P. O. Wells, filed in the Clerk's office an affidavit for service of summons by publication, upon the ground that the defendant, Charles W. Clark, resided out of the State of Montana, and could not, after due diligence, be found therein. This affidavit was in the form and substance prescribed by the Code of Civil Procedure of the State of Montana. (Record pages 35, 36.) Thereupon an order was made by the Clerk of the United States Circuit Court for the District of Montana upon said affidavit, wherein it was ordered that service of summons be made upon the defendant, Charles W. Clark, by publication thereof in the "*Daily Independent*," a newspaper published at the City of Helena, County of Lewis and Clark, State of Montana, and that said publication be made at least once a week for four successive weeks. It was further ordered that a copy of the summons and complaint be deposited in the Post Office at Helena, Montana, postpaid, directed to said defendant at San Mateo, State of California. This order was in accordance with the requirements of the provisions of the Code of Civil Procedure of the State of Montana, (Record pages 36-37,) and not in accordance with the United States law.

The summons was duly published, and proof thereof made, in accordance with said order, and the copy of the complaint and summons duly deposited in the Post Office at Helena, Montana, directed to Charles W. Clark, at San Mateo, California.

Charles W. Clark, the defendant below, plaintiff in error here, appearing specially for the purposes of the motion alone,

and not in any way acceding or consenting to the jurisdiction of the court, filed his motion to quash the service of summons in said action, upon the ground, (1) that the summons had never at all, or in any manner, been served upon the defendant personally in the State of Montana, nor had the defendant ever at any time waived service of summons or voluntarily entered his appearance in said cause; (2) that the publication of summons wherein and whereby the said summons had been published in a newspaper, did not give the court any jurisdiction over the defendant, nor was such service by publication permissible or in accordance with the rules of procedure in the United States Court, nor was the same sanctioned or authorized by any law of the United States, and that the said pretended service of summons by publication was void under the laws of the United States. (Record page 39.)

Thereafter the said cause came on before the court upon said motion to quash the service of summons. The matter was argued before the court, and in due time the court rendered its decision in the matter, and ordered that the said motion be overruled. (The opinion of the court overruling the motion to quash summons is found in the record on pages 18 to 23, inclusive.) Thereupon defendant below, plaintiff in error here, declined to plead further, and judgment was entered in favor of the plaintiff below, defendant in error here, against the defendant below, plaintiff in error here. (Record pages 23-25.)

Thereupon plaintiff in error filed his petition for a writ of error (Record pages 41-42); assignments of error (Record pages 42-43); and thereafter, on the 4th day of April, 1905,

Honorable William H. Hunt, Judge of said court, filed his certificate wherein it was duly certified that the order of the court denying the motion to quash service of summons was determined as presenting the question of jurisdiction of the court to further proceed in said cause, and that the certificate was made conformable to the Act of Congress of March 3, 1891, Chapter 517. (Record pages 43-44.)

Thereupon an order was duly made on the 4th day of April, 1905, allowing the writ of error, a bond was du' given as required in said order, and citation duly issued and served. (Record pages 43, 44, 45 and 46.)

ASSIGNMENT OF ERRORS.

We rely upon the following assignment of errors:

1. The court erred in overruling and denying the motion of plaintiff in error to quash the service of summons herein.

2. The court erred in holding that the appearance of the defendant, Charles W. Clark, in the District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow, for the purpose of removing the said cause from the said District Court to the Circuit Court of the United States, Ninth Circuit, District of Montana, made such an appearance in said cause as to obviate the necessity of further service of summons upon said defendant, and thereupon gave the Circuit Court jurisdiction to further proceed in said cause.

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3. The court erred in holding that the court could entertain jurisdiction of said cause by publication of summons, and

grant relief to the plaintiff in the suit upon service of summons by publication thereof and the mailing of a copy of said summons to the defendant at his residence without the State of Montana.

4. The court erred in holding that the fact that a writ of attachment was issued in said cause out of the District Court of the Second Judicial District of the State of Montana, within and for Silver Bow County, prior to the removal of said cause to the Circuit Court of the United States, Ninth Circuit, District of Montana, and which was levied upon the real estate of said Charles W. Clark in the County of Silver Bow, State of Montana, created such a lien as to constitute said suit one to enforce a legal or equitable lien upon the real or personal property within the district where said suit was brought, and authorized proceedings to obtain jurisdiction of the property of said defendant, Charles W. Clark, by the publication of summons.

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5. The court erred in holding that the fact that a writ of attachment issued in said cause out of the District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow, prior to the removal of said cause to the Circuit Court of the United States, Ninth Circuit, District of Montana, and the levying of the same upon the real estate of the said Charles W. Clark in the County of Silver Bow, State of Montana, was the creation of such a lien as to constitute said suit one to enforce a legal or equitable lien upon the real or personal property within the district where such suit is brought, and authorize proceedings to obtain jurisdiction of the property of said defendant, Charles W. Clark;

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and that the provisions of the Code of Civil Procedure of the State of Montana for the publication of summons were appropriate and applicable to the proceedings in said cause for the purpose of obtaining jurisdiction in the Circuit Court of the United States, Ninth Circuit, District of Montana.

6. The court erred in holding that the proceedings authorized by the provisions of the Code of Civil Procedure of the State of Montana relative to the service of summons by publication, were applicable to proceedings in the Circuit Court of the United States, Ninth Circuit, District of Montana.

7. The court erred in holding that it had jurisdiction to render judgment against the defendant, Charles W. Clark, in favor of the plaintiff in this cause.

ARGUMENT.

I.

THIS CASE IS PROPERLY BEFORE THIS COURT FOR THE PURPOSE OF REVIEWING THE DECISION OF THE CIRCUIT COURT UPON THE QUESTION OF ITS JURISDICTION.

The sole question for the determination of the court below was presented to that court upon the motion of the plaintiff in error to quash the service of summons, and the issue raised by that motion was the jurisdiction of the Circuit Court over the person of the plaintiff in error, the contention being that the Circuit Court had not acquired jurisdiction over the defendant below, plaintiff in error here, by a valid service of

process upon him. The Circuit Court decided that it had jurisdiction over the person of the defendant, overruled the motion to quash service of summons, took jurisdiction, and rendered a personal judgment against said defendant. Thereupon a writ of error was sued out, and the court certified the question of jurisdiction alone to this court for decision. This court, therefore, has jurisdiction to review said decision.

Section 1011 Revised Statutes, as corrected by the Act of February 18, 1875, Chapter 80, provides:

> "There shall be no reversal in the Supreme Court or in a Circuit Court upon a writ of error, for error in ruling any plea in abatement, other than a plea to the jurisdiction of the court, or for any error in fact."

In the case of Mexican Central Railway v. Pinkney, 149 U. S., on page 208, this court, in commenting upon this provision, said:

> "This entirely preserves to this court the right and duty to pass upon the jurisdiction of the lower court."

The Act of February 25, 1889, 25 Stat. 693, Chapter 236, provides:

> "That in all cases where a final judgment or decree shall be rendered in a Circuit Court of the United States, in which there shall have been a question involving the jurisdiction of the court, the party against whom the judgment or decree is rendered shall be entitled to an appeal or writ of error to the Supreme Court of the United States to review such judgment or decree without reference to the amount of the same; but, in cases where the decree or judgment does not exceed the sum of five thousand dollars, the Supreme Court shall not review any question raised

upon the record except such question of jurisdiction. Such writ of error or appeal shall be taken and allowed under the same provisions of law as apply to other writs of error or appeals."

The first clause of Section 5 of the Act of March 3, 1891, 26 Stat. 826, 827, Chapter 517, provides:

> "That appeals or writs of error may be taken from the District Courts or from the existing Circuit Court direct to the Supreme Court, * * * * in any case in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision."

In the case of Shepard v. Adams, 168 U. S., page 618, this court held that the question whether or not jurisdiction had been acquired by a proper service of process was one which involved the jurisdiction of the court within the meaning of the Act of Congress of March 3, 1891, Section 5, providing for an appeal from the District Court directly to the Supreme Court of the United States, when the jurisdiction of the former court was involved. And, in so holding, after commenting upon the case of Smith v. McKay, 161 U. S. 355, said:

> "The present case differs from Smith v. McKay in the essential feature that the contention is that the court below never acquired jurisdiction at all over the defendant by a valid service of process. In such a case there would be an entire want of jurisdiction, and a judgment rendered without jurisdiction can be reviewed on a writ of error directly sued out to this court."

The contention of the plaintiff in error in this case is that the court below never acquired jurisdiction at all over him by a valid service of process. The court below held against

this contention, and rendered judgment against the plaintiff in error. This judgment, as we contend, was rendered without jurisdiction, and therefore can be reviewed on a writ of error directly sued out to this court. The certificate of the judge who heard the case in the court below presents this question as the sole question for the consideration of the court. So that the case is properly here for review.

II.

THE CIRCUIT COURT WAS WHOLLY WITHOUT JURISDICTION TO PROCEED IN SAID CAUSE EITHER AGAINST THE PERSON OR PROPERTY OF PLAINTIFF IN ERROR, AND THE JUDGMENT AGAINST HIM WAS VOID.

This suit was commenced in the District Court of the First Judicial District of the State of Montana, in and for the County of Lewis and Clark. It is a suit upon a promissory note, in which a personal judgment is asked against the defendant for the principal sum alleged to be due upon the note, together with interest, costs and attorney's fee. It is purely an action *in personam*. There was no personal service of summons had upon the defendant at any time within the State of Montana. There was no service of summons by publication or otherwise, during the time the case was pending in the State Court and prior to its removal to the United States Circuit Court. During the time that the case was pending in the State Court, an affidavit and undertaking on attachment were filed, a writ of attachment issued, and certain alleged

interests in real estate of the plaintiff in error attachd. The plaintiff in error, without any service of process whatever upon him, specially appeared, and limiting his appearence specifically to the purpose of removing the case from the State to the Federal Court, filed his petition and bond in the State Court, and removed the case to the Federal Court upon the ground of diverse citizenship. After the case was removed into the Federal Court, and the record filed therein, the plaintiff below, defendant in error here, prepared and filed with the Clerk of the United States Circuit Court for the District of Montana an affidavit for publication of summons upon the plaintiff in error, basing his right thereto upon the ground that personal service of summons could not be had upon plaintiff in error in the State of Montana, and that he was without the State of Montana, and a resident of the State of California. This affidavit for publication of summons was prepared in conformity with the provisions of the Code of Civil Procedure of the State of Montana relative to publication of summons in the State Courts. An order for the publication was made by the Clerk of the United States Circuit Court for the District of Montana conformable to the provisions of the Code of Civil Procedure of the State of Montana. The summons was published in the newspaper designated in the order, a copy thereof and of the complaint mailed to the plaintiff in error at his place of residence in the State of California, and a copy of the summons and complaint served upon him in the State of California by the United States Marshal for the Northern District of California. This constituted the only service of process had upon the plaintiff in error in this case. There was no per-

sonal service of process within the State and District of Montana.

In due time the plaintiff in error made a special appearance for the sole purpose of moving that the service of process be set aside. This motion was denied by the court. A personal judgment was thereupon entered against the plaintiff in error and in favor of the defendant in error, for the amount demanded in the complaint.

The contentions of the plaintiff in error are:

1. (a) That the attachment of his property in the State of Montana did not give the State Court jurisdiction to proceed to render a judgment against the plaintiff in error without personal service of process upon him within the State of Montana; (b) nor did the State Court have jurisdiction to render a judgment collectible out of the property attached alone without publication of summons or substituted service in the manner required by the Code of Civil Procedure of the State of Montana.

2. The filing of the petition and bond for removal in the State Court did not constitute an appearance on the part of the plaintiff in error, and he was at liberty to assert in the Circuit Court of the United States the want of jurisdiction over his person upon the ground that process had not been served upon him at all.

3. After the removal into the Circuit Court the case must proceed in the same manner as if it had been originally commenced in the said Circuit Court, and the fact that property had been attached while the cause was pending in the State

Court prior to removal did not give the Circuit Court jurisdiction to proceed to a judgment without personal service of process upon the defendant within the State and District of Montana.

4. If the attachment proceedings constituted a legal or equitable lien upon the property of the plaintiff in error, within the meaning of section 8 of the Act of March 3, 1875, Chapter 137, 18 Stat. 472, Comp. Stat. Vol. 1, page 513, the publication of summons or other substituted service provided for by the Code of Civil Procedure of the State of Montana did not apply; and the proceedings taken under the Statute of the State of Montana were ineffectual to confer upon the United States Circuit Court for the District of Montana jurisdiction over the person or property of the defendant.

We will take up these propositions in the order named.

1. (a) *That the attachment of his property in the State of Montana did not give the State Court jurisdiction to proceed to render a judgment against the plaintiff in error without personal service of process upon him within the State of Montana.*

The doctrine announced by this court in the case of Pennoyer v. Neff, 95 U. S. 714, and uniformly followed since the decision in that case, is that no court can exercise, at common law, jurisdiction over a party unless he is served with process within the territorial jurisdiction of the court, or voluntarily appears.

This principle is elementary. As said by this court in Caledonian Coal Company v. Baker, 196 U. S. 445:

"It is firmly established that a court of justice cannot acquire jurisdiction over the person of a defendant, except by actual service of notice within the jurisdiction upon him, or upon some one authorized to accept service in his behalf, or by his waiver, by general appearance or otherwise, of the want of due service."

Goldey v. Morning News, 156 U. S. 518, 521.

Mexican Central Railway Co. v. Pinkney, 149 U. S. 209.

As said by the court in the case of Kendall v. United States, 12 Pet., 623:

"No court can, in the ordinary administration of justice in common law proceedings, exercise jurisdiction over a party unless he shall voluntarily appear, or is found within the jurisdiction of the court, so as to be served with process. Such process cannot reach the party beyond the territorial jurisdiction of the court."

Harris v. Hardeman, 14 Howard 334.

The proposition, therefore, that there can be no exercise of jurisdiction as against the plaintiff in error without the service of process upon him within the territorial jurisdiction of the court, or his voluntary appearance, cannot be successfully controverted.

(b) *Nor did the State Court have jurisdiction to render a judgment collectible out of the property attached alone without publication of summons or substituted service in the manner required by the Code of Civil Procedure of the State of Montana.*

There was no attempt to publish summons or obtain substituted service of process in the State Court prior to the removal of the case to the Federal Court.

The attachment of property is authorized by the Code of Civil Procedure of the State of Montana only as security for the satisfaction of any judgment that may be recovered.

Section 890 of the Code of Civil Procedure of the State of Montana relative thereto, is as follows:

> "The plaintiff, at the time of issuing the summons, or at any time afterwards, may have the property of the defendant attached, as security for the satisfaction of any judgment that may be recovered."

The Supreme Court of California (from which state Montana adopted the section of the Code under consideration), in the case of Low v. Adams, 6 Cal. 281, in commenting upon the remedy by attachment, said:

> "The remedy by attachment is not a distinct proceeding, in the nature of an action *in rem*, but is an adjunct, or a proceeding auxiliary to the action at law, designed for the purpose of securing the property of the debtor, to answer the judgment which may be obtained."

An attachment is not considered to be an independent proceeding. It is merely auxiliary to the main action to secure property of the defendant to be applied in satisfaction of the judgment for the plaintiff, providing he shall be able to establish his claim. The object is to obtain a lien upon the defendant's property to secure the payment of any judgment which the plaintiff may recover in the suit against him. But a party cannot be deprived of, or his rights affected, without having an opportunity to assert and defend them; and to bind a person by judicial sentence, he must be made a party to the proceedings, and must be served with actual or constructive notice of the proceedings. There must be a service of process upon him,

either actual or constructive, in order to enable the court to render a judgment that will be available to enforce the attachment lien against the property seized. There can be no judgment against the property levied on under the writ of attachment until there has been some service of process, actual or constructive, upon the defendant.

In order to give the court jurisdiction to proceed, notice by publication, or by some other means which the law provides in lieu thereof, is the essential element of jurisdiction. The defendant is not notified by the seizure or levy upon property. There must be a further publication of notice, or some other form of service as provided by law, before the court has jurisdiction to apply the property seized under the writ of attachment to the payment of the plaintiff's claim. It is essential that the plaintiff's claim should be established by a judgment. In order to do this, there must be, as said above, service of process in some form upon the defendant. Until this is done, the essential element, which is necessary to make available the application of the property to the payment of plaintiff's claim, is lacking; and, while the court may have jurisdiction of the case by virtue of the attachment proceedings, it has no jurisdiction to enforce the application of the property in the absence of service of process, actual or constructive, upon the defendant.

Where the attachment is merely ancillary to an action, as is the case under the Code of Civil Procedure of the State of Montana, the levy thereof gives no jurisdiction to render judgment without a service of summons sufficient to give jurisdiction in the main action.

In the case of Barber v. Morris, 37 Minn. 194, this question was discussed by the Supreme Court of that state, the attachment law of which is similar to that of Montana, to the extent that the attachment is recognized as an adjunct or a proceeding auxiliary to the action at law. The court said:

> "The court did not acquire jurisdiction by its attachment of property without any service of the summons. An attachment alone has not such an effect where, as is the case in this state, the attachment is ancillary to the action, a provisional remedy in the action, and not the means prescribed for the purpose of conferring jurisdiction."

Again, in the case of Heffner v. Gunz, 29 Minn. 108, the court, after stating that the ground of the attachment was that the defendant had departed from the state with inent to defraud his creditors, and had disposed of his property with like intent, said:

> "An attachment in such case, and under that statute, 'is only a provisional remedy in an action prosecuted, not as an independent proceeding, but in aid of the action, and' as security for the satisfaction of such judgment as the plaintiff may recover. The action is not commenced by the attachment, but by summons; and the failure to make such service of the summons, actual or constructive, as is authorized by statute, leaves the court without jurisdiction to enter a judgment against the defendant."

In the case of Walker v. Cottrell, 6 Baxt. (Tenn.) 267, the court, in discussing the character of the proceeding, under the laws of Tennessee, said:

> "The summons is the leading process in Tennessee. There cannot be two leading writs in the same suit against the same defendant at the same time, and the ancillary attachment can never become, by the most perfect and literal

compliance with the prescribed forms of the affidavit, writ and notice by publication, the instrument or means by which the court can obtain jurisdiction of the person of the defendant. This can only be done by summons, or by original or judicial attachment, levied and followed by the publication prescribed by the statutes, or voluntary appearance."

In the case of Cooper v. Reynolds, 10 Wall. 308, the court had under consideration the attachment laws of Tennessee. The question arose as to the admissibility of a judgment which was offered in evidence, under which certain property had been seized on attachment and sold under a judgment rendered upon publication of notice. The jurisdiction of the court to render the judgment was controverted upon the ground that the proceedings had not been strictly in conformity with the requirements of the local law.

The court said:

"Jurisdiction of the person is obtained by the service of process or by the voluntary appearance of the party in the progress of the cause.

"Jurisdiction of the *res* is obtained by a seizure under process of the court, whereby it is held to abide such order as the court may make concerning it. The power to render the decree or judgment which the court may undertake to make in the particular cause depends upon the nature and extent of the authority vested in it by law in regard to the subject-matter of the case."

And again, speaking of the nature of the proceeding in which the attachment was made, the court said:

"Its essential purpose or nature is to establish by the judgment of the court a demand or claim against the defendant, and to subject his property lying within the terri-

torial jurisdiction of the court to the payment of that demand."

And again, after commenting upon the fact that a publication of notice warning the defendant to appear, was authorized by the statute, the court said:

> "So also of the publication of notice. It is the duty of the court to order such publication, and to see that it has been properly made, and, undoubtedly, if there has been no such publication, a court of errors might reverse the judgment."

This is in accord with the principle announced above. The court cannot render judgment without service of process on the defendant in the manner required by law, and the judgment may not be collaterally attacked; but on appeal or writ of error in the case itself, the right to attack the judgment is fully recognized.

This question was before this court in the case of the Caledonian Coal Company v. Baker, 196 U. S. 432, and the effect of the attachment of the property of the defendant was commented upon by the court as follows, on page 445:

> "If by the laws of New Mexico a party having a cause of action against the company, based on the Acts of 1887 and 1890, could have sued out an attachment and caused it to be levied upon its lands in the Territory in order to secure the satisfaction of any judgment he might finally obtain in such action—upon which point we express no opinion—it would not follow that a personal judgment could have been rendered against the company. In such case the judgment of the court could not affect anything except the lands attached. No personal judgment could have been rendered against the company by reason merely of such attachment."

The remedy by attachment is an adjunct or a proceeding auxiliary to the action at law. The lien created thereby is ineffectual until a judgment is rendered establishing the claim of the plaintiff against the defendant. The validity of this judgment depends upon service of process, actual or constructive, upon the defendant. Until service of process, there is no jurisdiction in the court to proceed in the case. The jurisdiction to hold the property attached exists. There is no jurisdiction, however, to proceed to the application of the property to the claim of the plaintiff until service of process is had, or the voluntary appearance of the defendant in the case. There was no service of process attempted in said case prior to the removal. Therefore, there was no jurisdiction in the court to render a judgment either against the person or property of the plaintiff in error, and no such jurisdiction was claimed or asserted. When, therefore, the case was removed to the Federal Court, the State Court had no jurisdiction to proceed to render a judgment against the plaintiff in error personally, nor did it have jurisdiction to render a judgment collectible out of the property attached, for the reason that no steps had been taken to serve process upon the defendant, either actually or constructively. When the case was removed to the United States Court the only way in which summons could be served so as to give that court jurisdiction is the method prescribed by the laws of the United States. And this was not done. Service of process by publication under a state law in a case pending in the United States Court does not confer jurisdiction on that court.

2. *The filing of the petition and bond for removal in the State Court did not constitute an appearance on the part of*

the plaintiff in error, and he was at liberty to assert in the Circuit Court of the United States the want of jurisdiction over his person upon the ground that process had not been served upon him at all.

The appearance of the plaintiff in error in the State Court for the purpose of removing the case to the Federal Court was a special appearance for that purpose alone, and in express terms reserved the right to object to the jurisdiction of the court over his person or property.

Under the Act of 1789, which required a petition for removal to be filed by a defendant "at the time of entering his appearance in such State Court," it was held that the defendant necessarily entered his appearance in the State Court by petition for a removal, and could not thereafter, in the Circuit Court, deny the legal effect of the appearance so entered. But in the Act of 1875, and as amended by the Acts of 1887 and 1888, there was no requirement contained therein that the appearance be entered in the State Court by a defendant seeking removal.

And in the case of Goldey v. Morning News, 156 U. S. 518, it was held that the effect of a removal might be limited by specially appearing in the State Court for the purpose only of petitioning for such removal. In that case, the court says:

> "How far a petition for removal, in general terms, without specifying and restricting the purpose of the defendant's appearance in the State Court, might be considered, like a general appearance, as a waiver of any objection to the jurisdiction of the court over the person of the defendant, need not be considered; because, in the petition filed in the State Court for the removal of this action into the

Circuit Court of the United States, it was expressed that the defendant appeared specially and for the sole and single purpose of presenting the petition for removal. This was strictly a special appearance for this purpose only, and, whether the attempt to remove should be successful or unsuccessful, could not be treated as submitting the defendant to the jurisdiction of the State Court for any other purpose."

And the conclusion of the court is expressed as follows:

"The necessary conclusion appears to this court to be that the defendant's right to object to the insufficiency of the service of the summons was not waived by filing the petition for removal in the guarded form in which it was drawn up, and by obtaining a removal accordingly."

Subsequently, in the case of Wabash Western Railway v. Brow, 164 U. S. 271, the Supreme Court passed directly upon this question, and there held that the filing of a petition and bond for removal in a State Court, without objecting to the jurisdiction of such court over the person of the defendant, did not constitute an appearance; that the defendant was at liberty to assert in the Circuit Court of the United States the want of jurisdiction of his person if the service of process in the State Court was defective, or if process was not served at all.

On page 279, the court says:

"By the exercise of the right of removal, the petitioner refuses to permit the State Court to deal with the case in any way, because he prefers another forum to which the law gives him the right to resort. This may be said to challenge the jurisdiction of the State Court, in the sense of declining to submit to it, and not necessarily otherwise.

"We are of opinion that the filing of a petition for re-

moval does not amount to a general appearance, but to a special appearance only."

In the case of National Accident Society v. Spiro, 164 U. S. 281, the Circuit Court of Appeals for the Sixth Circuit certified the following question to the Supreme Court:

> "Does a defendant by filing a petition in a State Court for removal of the cause to the United States Court, in general terms, unaccompanied by a plea in abatement, and without specifying or restricting the purpose of his appearance, thereby waive objection to the jurisdiction of the court for want of sufficient service of the summons?"

To which the answer of this court was:

> "For the reasons given and on the authorities cited in the case of Wabash Western Railway v. Brow, ante, 271, the question must be answered in the negative."

In the case of Conley v. Mathieson Alkali Works, 190 U. S. 411, the doctrine announced in the case of Goldey v. Morning News, supra, and Wabash Western Railway v. Brow, supra, was reaffirmed in the following language:

> "It was also held that the defendant by filing a petition for removal did not waive defects in the service of summons, and that objection could be made to such service in the Circuit Court of the United States in the same manner as if the action had been originally commenced there."

In the case of Courtney v. Pradt, 196 U. S. 89, on page 92 the court says:

> "When a case has been removed into the Circuit Court on the ground of diversity of citizenship, that court is entitled to pass on all questions arising, including the question of jurisdiction over the subject-matter in the State Courts; or the sufficiency of the service of mesne process to authorize the recovery of personal judgment."

The fact that the filing of a petition and bond for removal in the State Court does not constitute an appearance by the defendant, and that he is at liberty to assert in the Circuit Court of the United States the want of jurisdiction of his person, if the service of process in the State Court was defective, or if the process was not served at all, does not, under the decisions of this court, seem to be longer an open question.

3. *After removal into the Circuit Court the cause must proceed in the same manner as if it had been originally commenced in the said Circuit Court, and the fact that property had been attached while the cause was pending in the State Court prior to removal did not give the Circuit Court jurisdiction to proceed to a judgment without personal service of process upon the defendant within the State and District of Montana.*

If we assume that the attachment of property while the cause was pending in the State Court was effectual to give a legal lien that could be enforced against such property in satisfaction of any judgment that might be rendered against the defendant, still this did not do away with the necessity for personal service of process upon the defendant before a judgment could be rendered against him. A judgment against the defendant was necessary in order to make the lien by attachment available and enforceable.

The case coming by removal into the Federal Court, then proceeds in the same manner as if the the case had been originally commenced in said court. The removal of the cause did not give the Federal Court jurisdiction to proceed further

to enforce the lien acquired by the attachment until service of process had been had upon the defendant .

The case may be assumed to have been rightly commenced in the State Court, the lien by attachment rightly acquired, the case properly removed to the Circuit Court: the lien by attachment still continued after removal, but could only be enforced against the property attached when judgment was rendered against the defendant. This could only be done upon personal service of process upon the defendant within the territorial limits of the jurisdiction of the Circuit Court, or if the attachment proceedings constituted a legal or equitable lien upon the property of the plaintiff in error, within the meaning of Section 8 of the Act of March 3, 1875, Chapter 137, 18 Stat. 472, Comp. Stat. Vol 1, page 513, by publication of the order of court under the provisions of said section. The publication of summons, under the provisions of the Code of Civil Procedure of the State of Montana, could not be effectual.

THE SERVICE OF PROCESS MUST HAVE BEEN PERSONAL UPON THE DEFENDANT WITHIN THE STATE AND DISTRICT OF MONTANA IN ORDER TO ENFORCE THE ATTACHMENT LIEN.

The Federal Court did not acquire any jurisdiction by virtue of the attachment made in the State Court prior to the removal of the cause, because United States Courts have no jurisdiction in suits founded on foreign attachment and without personal service of process. The writ of attachment in this case was levied upon "all the right, title and interest of the defendant, Charles W. Clark, in and to the following real estate, to-wit, lots nine (9) and ten (10) in block twenty-one (21)

of the Original Townsite of Butte, Silver Bow County, Montana, and all the buildings and improvements thereon standing in the name of Katherine Q. R. Clark on the records of the Recorder in said County." (Record page 31).

In the case of Perkins v. Hendryx, 40 Fed. 657, decided in the Circuit Court for the District of Massachusetts, this question was under consideration. The suit was originally brought in the State Court, and was removed by the defendants to the Circuit Court. No personal service of process was made upon the defendants, who were residents of the State of Connecticut, but at the time the original writ was issued the property of the defendants in the hands of certain residents of Boston was attached. The defendants moved to dismiss the suit for want of jurisdiction. The first question presented was whether the Circuit Court acquired jurisdiction by virtue of the writ of attachment made in said court. The court said:

> "This question must be answered in the negative, because the law is settled that the United States Courts have no jurisdiction in suits founded on foreign attachment, and without personal service of process."

The second question was whether the act of the defendants in appearing in the State Court for the purpose of removing the case to the Circuit Court, constituted a waiver of any irregularity as to the service of process; and this also was answered in the negative. But this second question has already been discussed above.

In the case of Toland v. Sprague, 12 Pet. 300, on page 330, the court announced as the conclusions to which it had arrived the following:

"1st. That by the general provisions of the laws of the United States, the Circuit Courts can issue no process beyond the limits of their districts. 2d. That independently of positive legislation, the process can only be served upon persons within the same districts. 3d. That the acts of Congress adopting the same process, adopt the form and modes of service, only so far as the persons are rightfully within the reach of such process, and did not intend to enlarge the sphere of the jurisdiction of the Circuit Courts. 4th. That the right to attach property, to compel the appearance of persons, can properly be used only in cases in which such persons are amenable to the process of the court *in personam;* that is, where they are inhabitants, or found within the United States; and not where they are aliens, or citizens resident abroad, at the commencement of the suit, and have no inhabitancy here; and we add, that even in case of a person being amenable to process *in personam,* an attachment against his property cannot be issued against him; except as part of, or together with, process to be served upon his person."

Under the Act of March 3, 1875, as amended by the Acts of 1887 and 1888, Section 3, after the case was removed from the State Court to the Federal Court, it proceeds in the same manner as if it had been originally commenced in the said Circuit Court.

18 Stat. 470.

Comp. Stat. Vol. 1, page 510.

Under the decision in the case of Toland v. Sprague, supra, governing the law relative to the exercise of jurisdiction by the Circuit Courts, there could be no service of process available even against the property of the plaintiff in error without personal service of process within the State and District of Montana.

In the case of Levy v. Fitzpatrick, 15 Pet. 167, on page 171, the court said, after quoting from Section 11 of the Judiciary Act of 1789:

> "The construction given to these provisions by this court is, that no judgment rendered by a Circuit Court against any defendant who has not been served with process issued against his person, in the manner pointed out; unless the defendant waive the necessity of such process, by entering his appearance to the suit."

In the case of Herndon v. Ridgway, 17 How. 424, on page 425, the court said:

> "The jurisdiction of the District Court over parties is acquired only by a service of process, or their voluntary appearance. It has no authority to issue process to another state."

In the case of Chaffee v. Hayward, 20 How. 208, which was a case to recover damages for an alleged infringement of a patent, the defendant plead to the jurisdiction of the court that he was not a resident of the District of Rhode Island, and was not served with process within the District. The plaintiff demurred, and the court overruled the demurrer and dismissed the case for want of jurisdiction. The Supreme Court, after quoting from Section 11 of the Judiciary Act of 1789, said:

> "It has been several times held by this court as the true construction of the foregoing section, that jurisdiction of the person of a defendant, (who is an inhabitant of another state,) can only be obtained, in a civil action, by service of process on his person, within the district where the suit is instituted; and that no jurisdiction can be acquired by attaching property of a non-resident defendant, pursuant to a State attachment law."

In the case of Harland v. United Lines Tel. Co., 40 Fed.

308, it was held that a Federal Court cannot, by attachment of property within the district where suit is brought, acquire jurisdiction to render judgment against such property, where the owner is not a resident of the district and is not legally found and served therein, so as to authorize a personal judgment. This rule is not changed by the Act of Congress of March 3, 1887, authorizing a suit to be brought, where jurisdiction is founded on the fact of diverse citizenship solely, in the district of the residence of either plaintiff or defendant. And the court there said, in commenting upon the provisions of Section 915 Revised Statutes:

> "Section 915 entitles plaintiff, in common-law causes in the courts of the United States, to similar remedies by attachment against the property of the defendant which are provided by the law of the state in which such court is held for its courts. It empowers the United States Court to adopt the remedies by attachment or other process, and relates to methods and forms. It does not create jurisdiction over property without personal service upon the defendant."

In the case of Nazro v. Cragin, 3 Dill. 474, on page 476, the court said:

> "If the court has or can acquire jurisdiction over the defendant personally this section gives to the plaintiff the right to the auxiliary remedy by attachment, but it does not afford a means of acquiring jurisdiction."

Chittenden v. Darden, 2 Woods 437.

In the case of Central Trust Co. v. Chattanooga, etc., Co., 68 Fed. 685, on page 695, the court, after quoting Section 915 Revised Statutes of the United States, said:

> "It has not been held, however, that this Act does not

confer upon United States courts jurisdiction to entertain suits by the process of foreign attachment, and that the statute and any rule adopting the state laws do not give a Circuit or District Court power thus to acquire jurisdiction over a person not a resident of the district, nor served with process therein."

To the same effect are the following cases in the Circuit Courts:

Day v. Rubber Co., 1 Blatchf. 630; Fed. Cas. 3685.

Atkins v. Fibre Co., 7 Blatchf. 566; Fed. Cas. 602.

Saddler v. Hudson, 2 Curt. 7; Fed. Cas. 12206.

Anderson v. Shaffer, 10 Fed. 267.

Noyes v. Canada, 30 Fed. 666.

Treadwell v. Seymour, 41 Fed. 581.

In the case of Ex Parte Railway Co., 103 U. S. 794, on page 796, Chief Justice Waite said:

"It is conceded that the person against whom this suit was brought in the Circuit Court was an inhabitant of the State of Massachusetts, and was not found in or served with process in Iowa. Clearly, then, he was not suable in the Circuit Court of the District of Iowa, and unless he could be sued no attachment could issue from that court against his property. An attachment is but an incident to a suit, and unless the suit can be maintained the attachment must fall."

In the case of Goldey v. Morning News, supra, on page 521, this court said:

"It is an elementary principle of jurisprudence, that a court of justice cannot acquire jurisdiction over the person of one who has no residence within its territorial jurisdic-

tion, except by actual service of notice within the jurisdiction, upon him or upon some one authorized to accept service in his behalf, or by his waiver, by general appearance or otherwise, of the want of due service."

This quotation was quoted with approval by this court in the case of Conley v. Mathieson Alkali Works, 190 U. S. 411.

Under these authorities, the plaintiff in error did not make such a general appearance when he removed the case from the State Court to the Federal Court as to waive his right to question the jurisdiction of the Federal Court. The fact that an attachment had been levied upon property standing in the name of another prior to the removal, did not confer jurisdiction upon the Federal Court after removal to proceed further without personal service of process upon him within the district. If personal service could not be had upon him in the district, Sections 914 and 915 of the Revised Statutes of the United States did not authorize the Federal Court to proceed to render judgment against the defendant, and apply the property attached thereon, without such personal service of process; and in the absence thereof, the Federal Court could not proceed to render any judgment that would make the lien of attachment available and enforceable.

4. *If the attachment proceedings constituted a legal or equitable lien upon the property of the plaintiff in error, within the meaning of Section 8 of the Act of March 3, 1875, Chapter 137, 18 Stat. 472, Comp. Stat. Vol. 1, page 513, the publication of summons or other substituted service provided for by the Code of Civil Procedure of the State of Montana did not apply; and the proceedings taken under the statute of the*

State of Montana were ineffectual to confer upon the United States Circuit Court for the District of Montana jurisdiction over the person or property of the defendant.

After the case was removed to the Federal Court, the defendant in error filed an affidavit for the publication of summons under the provisions of the Code of Civil Procedure of the State of Montana, Sections 637 and 638, which read as follows:

> (Sec. 637.) "When the person on whom the service of a summons is to be made, resides out of the state, or has departed from the state, or cannot, after due diligence, be found within the state, or conceals himself to avoid the service of the summons; or when the defendant is a foreign corporation, having no managing or business agent, cashier, secretary or other officer within the state, and an affidavit stating any of these facts is filed with the Clerk of the Court in which the action is brought, and such affidavit also states that a cause of action exists against the defendant in respect to whom the service of the summons is to be made, and that he or it is a necessary or proper party to the action, the Clerk of the court in which the action is commenced shall cause the service of the summons to be made by publication thereof."
>
> (Sec. 638.) "The order of the Clerk must direct the publication to be made in a newspaper, to be designated as most likely to give notice to the person to be served, at least once a week for four successive weeks. In case of publication, where the residence of a non-resident or absent defendant is known, the Clerk must forthwith deposit a copy of the summons and complaint in the postoffice, directed to the person to be served at his place of residence. When publication is ordered, personal service of a copy of the summons and complaint out of the state is equivalent to publication and deposit in the postoffice.

The service of summons is complete on the day of the fourth publication."

The order of the Clerk was made, summons was duly published in the newspaper designated, a copy thereof was mailed to the plaintiff in error, and actual service was made upon the plaintiff in error by the United States Marshal in the Northern District of California.

Assuming that the attachment of property in the District of Montana constituted a legal lien, and that the suit was a suit to enforce a legal lien upon property within the district, the Statute of the State of Montana relative to the publication of summons against an absent defendant would have no application, and could not be made available, for the reason that no substituted service as provided for by the said law, could be effectual to authorize a judgment against the plaintiff in error *in personam*. And if it was sought to obtain jurisdiction for the purpose of enforcing the attachment lien as a proceeding *in rem or quasi* proceeding *in rem*, the Statute of the United States relative thereto was exclusive.

The principle established by the authorities above cited is that a Federal Court cannot, by attachment of property within the district where the suit is brought, acquire jurisdiction to render judgment against such property where the owner is a non-resident of the district, and not legally found and served therein so as to authorize a personal judgment. The Circuit Court cannot render judgment against a defendant who has not been personally served with process. The fact that the defendant removed the case does not affect the rule, and the state statute authorizing service of process by publication, or

otherwise, upon absent and non-resident defendants, has no application to suits *in personam*.

Pennoyer v. Neff, 95 U. S. 714.

Goldey v. Morning News, 156 U. S. 518.

Roller v. Holly, 176 U. S. 398.

Assuming that the defendant in error, by virtue of the attachment, had a legal lien which he could enforce in proceedings to that end, and that the Circuit Court, after removal, had jurisdiction to proceed and apply the property attached in payment of the plaintiff's claim, the proceedings under which this could be done have been specially provided in Section 8 of the Act of March 3, 1875, Chapter 137, 18 Stat. 470, Comp. Stat. Vol. 1, Page 513, which section reads as follows:

> "That when in any suit, commenced in any Circuit Court of the United States, to enforce any legal or equitable lien upon, or claim to, or to remove any incumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of, or found within, the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, plead, answer, or demur, by a day certain to be designated, which order shall be served on such absent defendant or defendants, if practicable, wherever found, and also upon the person or persons in possession or charge of said property, if any there be; or where such personal service upon such absent defendant or defendants is not practicable, such order shall be published in such manner as the court may direct, not less than once a week for six consecutive weeks; and in case such absent defendant shall not appear, plead, answer, or demur, within the time so limited, or within some futher time,

to be allowed by the court, in its discretion, and upon proof of the service or publication of said order, and of the performance of the directions contained in the same, it shall be lawful for the court to entertain jurisdiction, and proceed to the hearing and adjudication of such suit in the same manner as if such absent defendant had been served with process within the said district; but said adjudication shall, as regards said absent defendant or defendants without appearance, affect only the property which shall have been the subject of the suit and under the jurisdiction of the court therein, within such district, and when a part of the said real or personal property against which such proceeding shall be taken shall be within another district, but within the same state, Provided, however, that any defendant or defendants not actually personally notified as above provided may, at any time within one year after final judgment in any suit mentioned in this section, enter his appearance in said suit in said Circuit Court, and thereupon the said court shall make an order setting aside the judgment therein, and permitting said defendant or defendants to plead therein on payment by him or them of such costs as the court shall deem just; and thereupon said suit shall be proceeded with to final judgment according to law."

This provision expressly provides a method by which an absent defendant may be brought into the United States Court, when a suit is there pending to enforce any legal or equitable lien upon real or personal property, and the method is outlined in the Act. It is different in essential respects from the method provided by the sections of the Code of Civil Procedure of the State of Montana above quoted, and which were followed by the defendant in error. If Congress has legislated upon a given subject and prescribed a definite rule for the government of the Federal Courts, it is exclusive of any legislation of the states on the same subject.

Section 721 Revised Statutes of the United States, provides:

> "The laws of the several states, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

And Section 914 Revised Statutes provides:

> "The practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the Circuit and District Courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such Circuit or District Courts are held, any rule of court to the contrary notwithstanding."

In the case of Ex Parte Fisk, 113 U. S. 713, the court said, recognizing the law as settled:

> "We think it may be added further in the same direction, that if Congress has legislated on this subject and prescribed a definite rule for the government of its own courts, it is to that extent exclusive of any legislation of the states in the same manner."

And again, in the same case, in discussing the proposition that the case had been removed to the United States Court from the State Court, said:

> "The petitioner having removed his case into the Circuit Court has a right to have its further progress governed by the law of the latter court, and not by that of the court from which it was removed."

And again, in the case of Southern Pacific Company v. Denton, 146 U. S. 202, this court said, on page 209:

"And whenever Congress has legislated upon any matter of practice, and prescribed a definite rule for the government of its own courts, it is to that extent exclusive of the legislation of the state upon the same matter."

See also:

Whitford v. Clark County, 199 U. S. 522.

Here we have an express provision of the Statute of the United States providing a certain course of procedure when a suit is brought or pending, the object of which is to enforce a legal lien upon real or personal property. The case was pending in the Federal Court on removal after the case was removed to the Federal Court; and, as said above in Ex Parte Fisk, the law of the latter court must govern. The provisions of the state law for the publication of summons had no application. No judgment could be rendered against the defendant without personal service of process upon him within the state. The Federal Court had no jurisdiction in the absence of such personal service of process to render a judgment *in personam.* If any judgment in the nature of a judgment *in rem,* or a judgment to enforce a legal lien, could be rendered by the court, it could only be done after service of process in accordance with the provisions of the Act of Congress upon that subject. The Act of Congress was exclusive of all other methods of procedure.

No attempt was made to comply with the provisions of the Act. The plaintiff in error specifically appearing for the purpose, filed his motion to quash the service of summons upon the ground that the court had not acquired jurisdiction to proceed in the case against him; that the summons had never

been served upon him personally within the State of Montana, and that he had never waived service of summons or voluntarily entered his appearance in the case; and that the publication of summons as made was void under the laws of the United States. (Record page 39.) The appearance for this purpose was special and the jurisdiction of the court was properly attacked.

Mexican Central Ry. Co. v. Pinkney, 149 U. S. 209.
Harkness v. Hyde, 98 U. S. 476.

The court had no jurisdiction, because there had been no service of process. The judgment rendered was, as we contend, void.

For the foregoing reasons, we submit that the court below erred in denying the motion of the plaintiff in error, and in rendering judgment against the plaintiff in error; and that the said judgmet should be reversed.

Respectfully submitted,

W. M. BICKFORD,
GEORGE F. SHELTON,
WILLIAM A. CLARK, JR.,
Counsel for Plaintiff in Error.

NO. [illegible]

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JAMES H. McKENNEY

IN THE

SUPREME COURT

OF THE

UNITED STATES

CHARLES W. CLARK,

Plaintiff in Error,

vs.

P. O. WELLS,

Defendant in Error.

BRIEF OF N. W. McCONNELL,

Attorney for Defendant in Error.

IN THE

SUPREME COURT

OF THE

UNITED STATES

CHARLES W. CLARK,

Plaintiff in Error,

vs.

P. O. WELLS,

Defendant in Error.

ARGUMENT OF N. W. McCONNELL IN BEHALF OF THE DEFENDANT IN ERROR IN THE ABOVE ENTITLED CAUSE.

BRIEF OF THE ARGUMENT.

The motion to quash service of summons was treated in the court below as equivalent to a motion to dismiss the action for want of jurisdiction. We shall therefore argue the question of jurisdiction. If the court below was right in holding that the court had jurisdiction, then none of the several assignments of error can be sustained.

Section 914 of the Chapter of the Revised Statutes of the United States, being Chapter XVIII, on the subject of "Procedure," is as follows, to-wit: "The practice, plead-

ings, and forms and modes of procedure in civil cases, other than equity and admiralty cases, in circuit and district courts, shall conform, as near as may be, to the practice, in like cases, in the courts of record of the State within which such circuit or district courts are held, any rule of court to the contrary notwithstanding."

It has been held by the Federal Courts that this section applies only to matters of practice and procedure, and does not enter into the question of jurisdiction. In other words, a party bringing suit in the United States Court and failing to get service of process upon the defendant, and the defendant failing voluntarily to appear in the case, the United States court cannot acquire jurisdiction by taking out an attachment and attaching the property of the defendant in the district in which the plaintiff resides, or elsewhere. These cases hold that the right to an attachment under Section 915 of the Revised Statutes of the United States, is ancillary to the summons, and that the summons must be actually served upon the defendant within the district, or he must make a voluntary appearance before an attachment will issue in favor of the plaintiff. Section 915 provides that, "In common law cases in the circuit and district courts, the plaintiff shall be entitled to similar remedies by attachment or other process, against the property of the defendant, which are now provided by the laws of the state in which such court is held for the courts thereof; and such circuit or district courts may, from time to time, by general rules, adopt such state laws as may be in force in the states where they are held in relation to attachments

and other process, provided that similar preliminary affidavits or proofs, and similar security, as required by such state laws, shall be first furnished by the party seeking such attachment or other remedy. See the following cases:

Harland v. United Lines Telegraph Co., 40 Fed. 308.

Boston Electric Co. v. Electric Gas Lighting Co., 23 Fed. 838.

Anderson v. Shaffer, 10 Fed. 266.

Toland v. Sprague, 12 Peters, 729.

Lackett et al. v. Rumbaugh, et al, 45 Fed. 23.

The act of March 3, 1875, as amended by the acts of March 3, 1887, and August 12, 1888, in defining the jurisdiction of circuit and district courts of the United States, Section 1, says: * * * * "And no civil suit shall be brought before either of said courts against any person by original process or proceeding in any other district than that wherein he is an inhabitant, but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suits shall be brought only in the district of the residence of either the plaintiff or the defendant." See U. S. Compiled Statutes, page 508.

It will be noted that the limitation is that no civil suit shall be brought * * * "by *any original process or proceeding.*" We desire to call attention to this language further on in this argument.

There is a broad distinction between an action commenced properly in the state court and removed by the defendant to the United States Circuit Court and a case brought in the United States Court. The limitation as to where

the suit shall be brought by the expression, "By any original process or proceeding," does not apply to a case brought in the state court and removed to the Federal Court. There is one case, that of Perkins vs. Hendryx, et al, 40 Fed. 657, which holds that, "A Federal Court does not acquire jurisdiction of a suit removed from a state court by virtue of an attachment made in the state court, where there was no personal service of process on defendant, a resident of another state." And it was held in that case that the defendant does not, by appearing in the state court for the purpose of removing the case to the Federal Court, thereby waive any irregularity as to "service of process." An examination of this case shows that this question, that the Federal Court could not acquire jurisdiction where a case was removed from the state court which was commenced by attachment, was not considered or argued. This case stands alone upon this subject and is attacked and overruled by a number of later cases.

In the case of Crocker National Bank vs. Pagenstecher, et al., 44 Fed. 705, the court held that, "The provision of the acts of Congress (referring to those referred to above) that no suit shall be brought in the circuit court against any person by any original process * * * in any other district than that wherein he is an inhabitant, applies only to suits commenced in that court; and it is no bar to the jurisdiction of the circuit court of a case removed to it from a state court that defendant was not a resident of the district, and that the state had acquired jurisdiction by foreign attachment, without any personal service."

That case was one in which a motion was made to dismiss the action for the want of jurisdiction. It was brought in the state court and was removed by the defendant to the Federal Court where this motion was made. The basis of the motion was two-fold: 1, that the defendants were not residents of the district of Massachusetts; and, 2, that no personal service of process had been made upon them. The defendant relied upon the above case of Perkins vs. Hendryx, in support of the motion. In commenting upon this case the court say. "But it is to be observed in the first place that the cases quoted in support of this proposition (Toland vs. Sprague, 12 Peters, 300; Sadlier vs. Fallon, 2nd Curtis, 559; Chittenden vs. Darden, 2 Woods, 437), are all cases in which the action was originally brought in the circuit court, and they are decided, not on the broad ground that in no case can the courts of the United States have jurisdiction founded on foreign attachment without personal service, but on the ground that an action so brought does not come within the jurisdictional provisions of the 11th section of the Judiciary Act of 1789. Those provisions described the district in which suits shall be brought, and were so construed as to forbid the original jurisdiction of circuit courts over actions in which there was no personal service on the defendant. But the question was not raised nor decided as to whether those provisions also controlled the jurisdiction in cases removed to the circuit court."

In the case of Richmond vs. Brookings, 48 Fed. 241, it was held that "the act of Congress (referring to the same

acts above quoted) providing that no suit shall be brought in the circuit court against any person by any original process * * * in any other district than that wherein he is an inhabintant," applies only to suits commenced in that court; and, in a case removed to it from a state court, "its jurisdiction is not affected by the fact that defendant was not a resident of the district, and that the state court had acquired jurisdiction by foreign attachment without personal service." In that case a motion was made to dismiss for want of jurisdiction, and the case of Perkins vs. Hendryx was relied upon in support of the motion.

In the opinion in this case the court say: "The judgment, it is true, can bind only the property; but the judgment is in form against the person and not against the property. It is, therefore, in its effect only, and not in its character, that the action can be called an action *in rem;* and, if this be not so, still there is no reason why the action should be dismissed."

The case of Purdy vs. Wallace Muller & Co., Limited, 81 Fed. 513, is an instructive one. In that case the action was begun in a state court against a non-resident defendant by process of foreign attachment, without personal service, or voluntary submission on the part of the defendant to the jurisdiction of the court. It was held that the "custody of a *res* being recognized by the Federal Courts as a ground of jurisdiction, as well as personal service of process, a suit begun in a state court by attachment of property and removed into a Federal court, would not be there dismissed for want of jurisdiction because there

had been no personal service." This case distinguishes the case of Goldy vs. Morning News, 156 U. S. 518. In this case the court say: "It is obviously not the purpose of the removal statutes to destroy a valid jurisdiction of the state court. Nor is it the purpose to secure to a defendant the right to litigate in the district of his own domicile, since the removal must be to the United States Court for the district wherein the suit was begun." The case of Goldey vs. Morning News and Railway Co. vs. Brow did not involve a consideration of the exception pointed out in Pennoyer v. Neff and St. Clair v. Cox to the general rule requiring personal service or voluntary submission. In the case of Cowley v. Railroad Co., 159 U. S. 583, it was said: 'The case having been removed to the circuit court upon the petition of the defendant, it does not lie in its mouth to claim that such court had no jurisdiction of the case, unless the court from which it was removed had no jurisdiction.' In that case also, it was urged as a reason for dismissal that the removal has rendered it impossible to carry out the provisions of the state law for giving notice to the defendant; that the service of citation by publication or notice required by the Massachusetts statute in cases of foreign attachment was not made before removal, and counsel have cited many cases, including Toland v. Sprague, 12 Peters, 300; Picquet v. Swan, 5 Mason, 35 Fed. Cas. No. 11,134, Dormitzer v. Bridge Co., 6 Fed. 217, etc., to sustain the proposition that the courts of the United States have no power to give the notice required by the State law. From this it was urged that as the United

States Court could not complete the service, and as, by removal, the state court is precluded from doing so, there exists no power to carry out the full procedure on foreign attachment, and that all proceedings instituted in the state court have therefore been rendered ineffective, and that not only is there no jurisdiction of the defendant's person, but also no complete attachment of property, and that the logical consequence is a dismissal.

The court say, in commenting upon this position of counsel that, "Such a conclusion is by no means necessary.

If we have no power to deal with the case, this is a reason for remanding it to a court which has such power. But is it necessary the service by publication or notice should be completed? The object of service by publication or notice is to give the defendant due warning of the seizure of his property, and of the proceedings to appropriate it. By appearing in the state court before the lapse of the time within which notice might be given, and filing his petition for removal, wherein he recites the pendency of the suit, and alleges the dissolution of the attachment and the giving of a bond, he puts upon record conclusive evidence of his knowledge of the proceedings, and renders publication or further notice an idle formality. It is a familiar principle that a party, by appearing before service, waives it; and, although the appearance in this case was limited to the single purpose of removal, the appearance for that limited purpose is inconsistent with a claim of lack of actual notice of the existence of the case. Had the defendant waited until publication had been made or notice

given, and then removed the case, he might then have objected in this court that the state statute had not been complied with. As a valid jurisdiction of the state court depends upon seizure of property, with seasonable notice to the defendant, it would seem reasonable to hold the appearance for purposes of removal, and the removal, which prevented further notice, a complete substitute for the notice required by the statute, and that the case should now stand exactly as if proper notice had been given, and full compliance with the Massachusetts statute had been made before removal. But, even if this is not the true view, the defendant's objection would lead, not to a dismissal, but to a remanding of the case, and therefore does not support the motion to dismiss. I think, moreover, that it is a serious question whether a defendant, by removing a case begun in a state court by a valid proceeding of foreign attachment, has not, by the very act of removal, submitted his person to the jurisdiction of the federal court, and that the decision of Goldey v. Morning News is not inconsistent with such view. The proceeding in that case could be regarded only as a personal action,—a personal action open to the objection that, according to the general rules of law, there had been no valid service. If there had been no proper service, there was no jurisdiction in either court which would be regarded as valid. The present case is substantially different. After seizure of the property the case may, at the election of the defendant, assume either of two forms.—that of a proceeding in which only the *res* is involved, or that of a personal action be-

tween individuals."

This case is precisely in point, because, while there was a valid attachment levied in the case at bar, the case was removed before the publication was commenced. It will be noted from these authorities that the jurisdiction which the state court acquired by attachment carries jurisdiction into the federal court when it is removed, for the reason that by virtue of the attachment in the state court, the *res* or the property attached is brought into the custody of the United States Circuit Court; it is not, then, a question of jurisdiction in the United States Circuit Court, for that has been acquired by the attachment in the state court, but it is a question of practice. It involves the procedure in the United States Circuit Court as to how notice shall be given to the defendant so as to enable the court to proceed to render judgment and subject the property attached to the payment of the debt so far as the proceeds realized from the sale thereof shall be sufficient to pay the same. While a judgment in form is rendered against the defendant for the amount of the debt, still it is limited as to satisfaction to the property attached.

Now, when we refer to Section 914, of the Revised Statutes of the United States, which provides that the practice, pleadings and forms and modes of procedure in civil cases, etc., shall conform to the practice, pleadings, etc., existing at the time in like causes when the courts of record of the state shall have held to be the practice, etc., in the United States Courts it does seem to us that it is too plain for argument that the practice in the state

courts in regard to notice should be the same in the United States Circuit Court. It is not a question of jurisdiction, but it is a question purely of practice. Jurisdiction has been acquired by the attachment; but the before arguing this further we desire to call the court's attention to a very learned case. It is as follows:

United States vs. Ottman, C. C., 1st Hughes, 313; In this the court held, after reviewing and construing Sections 1, 2 and 4 of the Act of March 3, 1875: "The decisions of the United States Courts under this legislation has been as follows:

"In Pollard vs. Dwight, 4 Cranch, 421, the proceeding was commenced by process of foreign attachment in the State Court and was removed by the defendants into the United States Circuit Court for that judicial district. The Supreme Court held that by appearing and pleading to issue the defendant waived all objection to the service of process.

In Toland vs. Sprague, 12 Peters, 330, where a suit was commenced in the Federal Court by foreign attachment the Supreme Court decided that the process of foreign attachment cannot properly issue from the Circuit Court of the United States against the property of a person non-resident in the judicial district for which the court is held, but that if a non-resident defendant appears to such process and pleads the issue he waives his exemption from liability to the service of process against him, and the court thereby acquires jurisdiction.

In Levy vs. Fitzgerald, 15 Peters, 171, the court say:

No judgment can be rendered by a Circuit Court against any defendant who has not been served with process issued against his person in the manner pointed out in Section 11, Judiciary Act of 1789, unless the defendant waive the necessity of such process by entering an appearance to the suit * * *.

In Sayler vs. Northwestern Insurance Company, 2nd Cur. 212, it was decided that where a suit was commenced by foreign attachment in a state court, if the defendant appears there and by motion remove the cause to the Circuit Court of the United States, it is then too late to object to jurisdiction of that court or to raise the objection in the United States Court of residing in the judicial district.

Five years after the decision of the case of Day vs. Hayward, 20 How. 214, the case of Barney vs. The Globe Bank of Boston, 5th Blt. 107 was decided. It was held that a suit commenced in a state court by attachment upon property of a non-resident defendant without personal service upon the defendant was within the meaning of the law of the United States relating to the removal of suits, and that the Federal Court has jurisdiction of the cause if properly removed, whether the defendant appears or not, although it would not have jurisdiction to compel the attendance of the defendant if the suit had been originally brought in that court.

In the cases of Cranch, Curtis and Blatchford the suits were commenced by attachment against the propery of the non-resident defendant in the State Court and in each case the suit was removed into the Federal Court on the

motion of the defendant. In each case the jurisdiction of the Federal Court was sustained.

In the cases in 12 Pet. and 20 How., suit was commenced by attachment in the Federal Court. In one of them the defendant appeared and pleaded the issue, and was held to have waived thereby his right of objection to the jurisdiction. In the other the defendant did not appear or plead the issue, and it was held that there was no jurisdiction to compel him to do so.

In the case now before us, being one properly commenced in a state court and properly removed to the Federal Court, it would seem to follow within the control of the decisions of Cranch, Curtis and Blatchford, and being dissimilar in esential particulars from those in Peters and in Howard, which were non-removable suits, would seem not to be governed by those cases.

There can be no doubt that the suit was rightfully brought in the State Court. It is not pretended but that that court possessed full jurisdiction to entertain and proceed in it. There can be no doubt that it was a removable suit and that it has been removed here regularly, legally and by proper proceedings * * *. They only contend that now that the suit has got here, this court cannot proceed with it, for want of jurisdiction to proceed.

I think jurisdiction to remove carries jurisdiction to proceed. Section 1 of the Act of 1875 provides only that such a suit as this shall not be *brought here by original process.* As this suit was not originally brought here at all by original process, that prohibition of the statute is

not violated. True, the statute requires that after a suit is removed here, it shall be proceeded in as if it had been originally commenced here, and it is contended that this requirement means *only* as "if originally commenced" here, and that inasmuch as a suit could not have been commenced here at all, it cannot be proceeded in here at all.

Such a construction of the clause relied on would lead to the mockery of allowing a cause proper for removal under the law, to be removed only for the purpose of turning it out of court. Such a construction is, of course, not to be given if it can be avoided. Happily, this construction is especially forbidden by Section 4 of the act which makes an exception to this requirement of such suits as are commenced in state courts by attachment, provides that, where any removable cause has been so commenced in the state court, such attachment shall hold the goods in the same manner as by law they would have been held to answer final judgment or decree, had it been rendered in the court in which such suit was commenced. This provision would be a mockery if the view of the defendant's counsel were correct. How could the money attached in the hands of the German Banking Company be held in this cause for such decree as the state court could have given, if no further step could be taken here, especially if, as defendant's counsel contend, the suit cannot now be remanded to the state court? Surely Congress could not have intended that such an absurdity of consequences should be reached by

judicial proceedings taken under its legislation.

The view of Mr. Justice Curtis, fully sustained by Judge Shipman, ought, therefore, in my judgment, to prevail, that if the suit be one rightfully brought in the state court, and which the act of Congress authorizes to be removed thence into the Federal Court, the very fact of the authority to remove empowers the Federal Court to take jurisdiction and proceed in the cause; the only real question in that court being, *Was the suit rightfully removed?* If a cause has thus come into the Federal Court, then Section 4 of the act empowers and requires that court to go on with it, and the court to render such decree against the property attached, as the state court should have given if the suit had remained there.

Congress has full constitutional power to give the United States Courts jurisdiction over defendants non-resident in the districts in which the actions against them are brought, and it has, in Sections 2 and 4 of the statute under consideration, given this power in the single instance of suits commenced by attachment in state courts, and removed into United States Courts. This can easily be made apparent.

It must not be overlooked that Section 1 avoids the use of such language as would embrace removable attachment suits commenced in state courts, into the class of suits in which, in order that the Federal Courts may have jurisdiction, it requires that defendants must live or be served with process in the judicial districts where the suits are brought.

As if to discriminate attachment suits removable out of state courts, from suits commenced in the Federal Courts, Section 1 is particular to say that no civil suits shall be brought in the Federal Court by any original process in a district where the defendant is not a resident or is not found; leaving suits commenced by original process in state courts out of its purview, to be governed by the provisions of Sections 2 and 4 which follow.

Sections 1 and 2 and 4 must of course be construed together. When so construed they induce the following reasoning, and lead to the following conclusions:

Under Section 1 jurisdiction over non-residents is in general not given to the Federal Courts in any suit commenced by original process in the Federal Courts; but under Sections 2 and 4, these courts may acquire such jurisdiction by removal of attachment suits commenced by original suit in state courts. Section 2 and 4 give jurisdiction of removed attachment suits commenced by original process in state courts and this jurisdiction of such suits is good over non-residents, unless it is prohibited by Section 1. But Section 1 avoids such a prohibition, for its limitation of jurisdiction only applies to suits commenced by original process in the Federal Courts; these limiting words not only not applying to removed suits commenced by original process in the state courts, necessarily implying that jurisdiction in such suits is left to be determined by Sections 2 and 4.

Moreover if the words, 'No civil suit shall be brought by any original process in the Federal Court against a

non-resident,' could be construed as denying jurisdiction of suits brought by original process in the state courts,—even in that event the words, 'Ought to end in the same class, *except as hereinafter provided,*' would require that the provisions in regard to attachment suits re moved from state courts under Sections 2 and 4 should be construed as falling within the exception.

This case is quoted at length in 11 Myers, Fed. Dec. Sections 1638-1643 inclusive.

In the case of Tootle vs. Coleman, 107 Fed. 45, the court say: "It follows from this conclusion that the state court obtained sufficient jurisdiction of the subject of this action and of the defendants by the garnishment and the service of the summons upon the defendants by publication to authorize the disposition of the moneys due from the garnishees by the judgment of the court, and the defendants are estopped by their removal of the cause from attacking the jurisdiction of the Federal Court on any other ground. It does not lie in the mouth of one who has removed a case from the state to the Federal Court to claim that the latter has no jurisdiction of the case, except upon the ground that the court from which it was removed was without jurisdiction."

It may seem that we have gone into discussion of matters that are not pertinent to this motion, but we have not. The counsel for the plaintiff in error does not seek to dismiss this case for the want of jurisdiction in the United States Circuit Court, but simply to quash the service of

summons. They say there is no authority for the practice adopted in this particular case and therefore it should be quashed. Then the question arises as to what condition that leaves the defendant in error in. He brought his suit in the State Court and attached the property of the defendant, but before he had time to perfect service by publication the defendant comes in by special appearance and removes the case to the United States Court. We go on and give notice by publication and also by personal service of summons and a copy of the complaint upon the defendant in the State of California, and have proof of that service by affidavit of a deputy United States Marshal.

That the appellant has had notice of suit pending against him abundantly appears. The court must either hold that Section 914, of the Revised Statutes, authorizes constructive service in the United States Circuit Court according to the State laws; or that the appearance of the plaintiff in error even though specially made for the purpose of removing the cause to the United States Circuit Court gives jurisdiction of his person under the peculiar circumstances of this case and authorizes a judgment against him, ~~not only~~ to subject his property to the payment of his debt ~~but in personam~~ or to remand the case to the State Court to be proceeded with there. The court below took the view that under the facts of this case the appearance of the plaintiff in error for the purpose of removal was equivalent ~~to a general~~ to an appearance. It can hardly be said

that the case must be remanded when the right to remove is clearly given by the statute. If one of the above alternatives is not available for the defendant in error in the United States Circuit Court, then he is put in the predicament of having, under the laws of the state, brought an action and attached property out of which to make his debt and thereby acquiring a valid lien upon said property only to be met by the defendant with a petition of removal into the United States Circuit Court where, for the want of power to give notice, this court is helpless, and he is to be sent forth from this court empty-handed, notwithstanding the provisions of the law of his State are amply able to give him relief. The act of Congress preserves the lien of the defendant in error upon the attached property and gives it the same efficacy in the United States Court that it had in the State Court, but if this motion to quash the service summons is to be sustained this preservation of his right in the United States Court will become to him but a hollow mockery.

~~It may be that the law is that the case shall continue to be one *in rem* and that the only right which the appellee has is to subject the lands attached to the payment of his debt. If this is true, the case should be sent back with directions to modify the decree accordingly.~~ We call the attention of the court to the able opinion of Judge Hunt, found in 136 Federal Reports, p. 462.

ATTACHMENT LAWS OF MONTANA.

While in the court below the regularity of the attach-

ment proceedings in the State Court were not questioned, still we deem it proper to submit a synopsis of the attachment laws in force at the time this proceeding was instituted in the State Court of the State of Montana. Section 890 of the Code of Civil Procedure is as follows:

"The plaintiff, at the time of issuing the summons, or at any time afterward, may have the property of the defendant attached, as security for the satisfaction of any judgment that may be recovered, unless the defendant give security to pay such judgment, as in this Chapter provided, as follows:

"In an action upon a contract, express or implied, for the direct payment of money, where the contract is not secured by any mortgage or lien upon real or personal property, or any pledge of personal property, or, if originally secured, such security has, without any act of the plaintiff, or the person to whom the security was given, become valueless."

Section 891 is as follows:

"The clerk of the court must issue the writ of attachment, upon receiving an affidavit by or on behalf of the plaintiff, showing:

1. That the defendant is indebted to the plaintiff (specifying the amount of such indebtedness over and above all legal counterclaims) upon a contract, express or implied, for the direct payment of money, and that the payment of the same has not been secured by any mortgage or lien upon real or personal property, or any pledge of personal property, or, if originally so secured, that such property has, without any act of the plaintiff, or the person to whom the security was given, become valueless; and,

2. That the atachment is not sought, and the action is not prosecuted, to hinder, delay, or defraud any creditor of the defendant."

Section 892 is as follows:

"Before issuing the writ the clerk must require a written undertaking on the part of the plaintiff, with two or more sufficient sureties, to be approved by the clerk, in a sum not less than double the amount claimed by the plaintiff, if such amount be one thousand dollars or under, or in case the amount so claimed by plaintiff shall exceed one thousand dollars, then in a sum equal to such amount, but in no case shall an undertaking be required exceeding in amount the sum of ten thousand dollars. The condition of such undertaking shall be to the effect that if the defendant recover judgment, or if the court shall finally decide that the plaintiff was not entitled to an attachment, the plaintiff will pay all costs that may be awarded to the defendant, and all damages he may sustain by reason of the issuing out of the attachment, not exceeding the sum specified in the undertaking."

Upon the subject of the levy of attachment upon real estate, see Section 895, Sub-Sections 1 and 2, which are as follows:

"The sheriff to whom the writ is directed and delivered must execute the same without delay, and if the undertaking mentioned in Section 893 be not given, as follows:

1. Real property standing upon the records of the county in name of the defendant must be attached by filing with the county clerk a copy of the writ, together with the description of the property attached, and by leaving a similar copy of the writ, description and a notice that it is attached, and by leaving a similar copy of the writ, description and notice with an occupant of the property, if there is one; if not, then by posting the same in a conspicuous place on the property attached.

2. Real property, or an interest herein, belonging to the defendant, and held by any other person, or standing on the records of the county in the name of any other person, must be atached by filing with the county clerk a copy of the writ, together with a description of the property, and a notice that such real property and any interest of the defendant therein, held or standing in the name of such other person (naming him) are attached, and by leaving with the occupant, if any, and with such other person or his agent, if known and within the county, or at the residence of either, if within the county, a copy of the writ, with the similar description and notice. If there is no occupant of the property, a copy of the writ, together with such description and notice, must be posted in a conspicuous place upon the property. The county clerk must index such attachment when filed, in the names both of the defendant and of the person by whom the property is held, or in whose name it stands on the record.

Section 892 provides that, "A lien by attachment shall accrue at the time the property of the defendant shall be attached by the officer charged with the execution of the writ in the order in which the writs are levied; and said lien shall not be affected by any subsequent attachment or by any judgment obtained subsequent thereto."

Section 637 contains the provisions for the service of summons by publication. It is as follows:

"When the person on whom the service of a summons is to be made, resides out of the state, or has departed from the state, or cannot, after due diligence be found within the state, or conceals himself to avoid the service of the summons; or when the defendant is a

foreign corporation, having no managing or business agent, cashier, secretary or other officer within the state, and affidavit stating any of these facts is filed with the clerk of the court in which the action is brought, and such affidavit also states that a cause of action exists against the defendant in respect to whom the service of the summons is to be made, and that he or it is a necessary or proper party to the action, the clerk of the court in which the action is commenced shall cause the service of the summons to be made by publication thereof."

Section 638 provides for an order to be made by the clerk directing the publication to be made. It is as follows:

"The order of the clerk must direct the publication to be made in a newspaper, to be designated as most likely to give notice to the person to be served, at least once a week for four successive weeks. In case of publication, where the residence of a non-resident or absent defendant is known, the clerk must forthwith deposit a copy of the summons and complaint in the postoffice, directed to the person to be served at his place of residence. When publication is ordered, personal service of a copy of the summons and complaint out of the state is equivalent to publication and deposit in the postoffice. The service of summons is complete on the day of the fourth publication."

Sub-Section 3, of Section 642, provides for the proof of publication. It is as follows:

"In case of publication, the affidavit of the printer, or his foreman or principal clerk, showing the same; and an affidavit of a deposit of a copy of the summons and complaint in the postoffice, if the same has been deposited."

It seems to us that there is a distinction between the

case at bar and similar cases where a lien has been acquired upon real estate by seizure by attachment under the state laws before removal into the United States Circuit Court and those cases where there has been an attempt to get personal service in the same court upon the defendant without such attachment. In the former case the state court has acquired jurisdiction of real estate; the plaintiff has instituted a proceeding *in rem* and the court has jurisdiction of the *res* and fastened a lien upon it. The United States Statute, Section 4, of the removal acts of March 3, 1875, as amended by the act of March 3, 1887, and August 13, 1888, provides:

> "That when any suit shall be removed from a state court to a circuit court of the United States, an attachment or sequestration of the goods or estate of the defendant had in such suit in the State Court shall hold the goods or estate so attached or sequestered to answer the final judgment or decree in the same manner as by law they would have been held to answer final judgment or decree had it been rendered by the court in which said suit was commenced; and all bonds, undertakings or security given by either party in such suit prior to its removal shall remain valid and effectual, notwithstanding said removal; and all injunctions, orders and other proceedings had in such suit prior to its removal shall remain in full force and effect until dissolved or modified by the court to which such suit shall be removed."

It will be seen that the United States statute protects the lien acquired by attachment in the State Court, so that the real estate attached in the State court is impounded in the United States Circuit Court by said attachment, and it

is as effective to hold the real estate so attached to answer the final judgment as if such attachment had been made by a writ issuing from the United States Court under Section 915 of the Revised Statutes.

REPLY TO THE ARGUMENT OF THE PLAINTIFF IN ERROR.

After the foregoing brief was in print, we received a copy of the brief of counsel for the plaintiff in error, to which we breifly reply as follows:

1. It is insisted, page 16 of his brief, by counsel for the plaintiff in error that, "in order to give the court jurisdiction to proceed, notice by publication or by some other means which the law provides in lieu thereof is the essential element of jurisdiction. We deny this. The essential element of jurisdiction is the attachment of the property. This attachment creates a lien upon the property under the State law, and the removal of the case into the Circuit Court of the United States does not invalidate this lien. The United States statute, as we have seen, expressly provides for the preservation of this lien in the United States Court. Where there is notice by publication or substituted service under the State statute this does not give jurisdiction over the person of the defendant to take judgment against him personally. All that the attaching creditor of the non-resident debtor can do under the State law is to subject the property attached which is within the jurisdiction of the State Court to the payment of the debt of the non-resident defendant. The only purpose of

giving the notice by publication or a substituted service is to make the non-resident debtor aware of the proceedings to subject the property attached to the payment of his debt. It is simply for notice; that is all.

Counsel further says: "Until this is done (that is service obtained in some manner) the essential element which is necessary to make available the application of the property to the payment of the plaintiff's claim is lacking; and while the court *may have jurisdiction* of the case by virtue of the attachment proceedings, it has no jurisdiction to enforce the application of the property in the absence of service of process, actual or constructive upon the defendant. We have seen under the authorities that this can be done. The question arises here, What is jurisdiction?

In the case of Grignon's Lessee v. Astor, 2nd How. 130, this court defines jurisdiction as follows:

> "The power to hear and determine a cause is jurisdiction; it is *coram judice* whenever a case is presented which brings this power into action; if the petitioner presents such a case in his petition, that on a demurrer the court would render a judgment in his favor, it is an undoubted case of jurisdiction; whether on an answer denying and putting in issue the allegations of the petition, the petitioner makes out his case, is the exercise of jurisdiction, conferred by the filing a petition continuing all the requisites, and in the manner required by law." "Any movement by a court is necessarily the exercise of jurisdiction; so, to exercise any judicial power over the subject-matter and the parties, the question is

whether, on the case before a court, their action is judicial, or extra-judicial, with, or without the authority of law, to render a judgment or decree upon the rights of the litigant parties. If the law confers the power to render a judgment or decree, then the court has jurisdiction, what shall be adjudged or decreed between the parties, and with which is the right of the case, is judicial action by hearing and determining it. It is a case of judicial cognizance, and the proceedings are judicial."

"This is the line which denotes jurisdiction and its exercise, in cases *in personam,* where there are adverse parties, the court must have power over the subject-matter and the parties; but on a proceeding to sell the real estate of an indebted intestate, there are no adversary parties, the proceedings is *in rem,* the administrator represents the land, they are analogous to proceedings in the admiralty, where the only question of jurisdiction is the power of the court over the thing, the subject-matter before them, without regard to the persons who may have an interest in it."

As a matter of caution the notice of publication was given as well as a constructive notice by actual service upon the plaintiff in error of the summons and a copy of the complaint, as required by the Statutes of Montana; but after he had appeared in court by his petition and asked for the removal of the case into the United States Circuit Court it seemed, as stated in the case of Purdy vs. Wallace, Mueller & Co., Limited, 81 Fed., supra, to render further notice an "idle formality."

"As a valid jurisdiction of the state court depends upon seizure of property, with seasonable notice to the defendant, it would seem reasonable to hold the ap-

pearance for the purposes of removing and the removal should prevent further notice and a complete substitute for the notice required by the statute, and that the case should stand exactly as if proper notice had been given in full compliance with the Statute of the State of Montana."

This is what the court below held. The court said in his opinion, see Transcript, p. 22: "The jurisdiction which the State court acquired by attachment created a jurisdiction in the Federal Court when the action was removed, for the reason that by virtue of the attachment in the state court the property attached was brought into the custody of the Federal Court."

The Court further says:

"The right of removal and the removal are based upon the fact of diverse citizenship. The one court lost and the other acquired jurisdiction on this account. Here the defendant has voluntarily accepted service of summons in the same court by exercising his right to remove the case to this court. Having based his petition upon the fact that he is a citizen of California, and having given the necessary bond, it ought to follow that although he appeared in the State Court solely to remove the case and would limit his appearance in this court, the attempt to have the action dismissed from it simply by his voluntary act in preventing the very notice contemplated by the State law by removing the case, relying upon such diverse citizenship, he has given this court jurisdiction of his person and authorized judgment against him which will not only subject his property to the payment of the debt involved but *in personam*. The satisfaction of this judgment rendered in the Federal Court against the defendant must be limited to the proceeds

realized from the sale of the property attached, but the judgment is in form against the person."

The court held that while the judgment was in form against the person, the satisfaction of the judgment must be limited to the proceeds realized from the sale of the property attached. We do not understand the court to have held that the judgment against the defendant was general and could be satisfied upon an execution issued and levied upon any other property of the defendant. The court adopts the rule laid down in the case of Purdy against Wallace, Mueller & Co., supra, in which it was held that the jurisdiction to remove carries with it jurisdiction to proceed, and where an action was properly instituted in the State Court and an attachment was had, and where petitioner relied solely upon a diversity of citizenship for removal, any construction which would allow a suit to be removed merely for the purpose of dismissing it would not be sound.

"But as I believe that the acts of the defendant had given jurisdiction of his person and authorized judgment against him to the extent indicated, the additional steps had by publication of summons and the service of a copy thereof and of the complaint, though pursued by plaintiff, were not essential."

If this court, then, were to hold that Section 914 of the Revised Statutes of the United States did not apply, and that the service of summons by publication or substituted service by service of summons and a copy of the complaint upon the plaintiff in error are void, and should sustain the motion of the plaintiff in error still, this cannot affect the

judgment rendered unless the court should hold that where the State Court had acquired jurisdiction of the *res* or property attached, which jurisdiction is continued in the Circuit Court of the United States upon removal, there is no power anywhere in the Circuit Court to proceed with this case. In other words, the case would present the anomally of a right without a remedy.

Section 8 of the Act of March 3rd, 1875, quoted at length in the brief of counsel for the plaintiff in error, pages 34-35, has no application whatever to the case at bar.

Counsel for the plaintiff in error doubtless realizing the absurd consequences to which his position led, undertake to avoid such consequences by asserting that the proper mode of procedure was under Section 8 of the act of March 3, 1875.

The provisions for publication and substituted service of process under said statute are not applicable to cases removed from a state court to the Federal Court,—the section being confined in its very terms to actions commenced in the Federal Courts. The language of the act is, "*commenced*" in any Circuit Court of the United States", etc. Woolridge v. McKenna, 8 Fed. Rep. 680. This case holds that the provisions for publication and substituted process are not favored and are strictly construed against the right. Batt v. Proctor, 45 Fed. Rep. 515.

Prior to the passage of the act of March 3, 1875, the authority of the circuit courts of the United States to make an order for publication or substituted service directing a

defendant—who was not an inhabitant of nor found within the district and who did not voluntarily appear—to appear, plead, answer, or demur, was restricted to suits in equity brought to enforce legal or equitable lien or claims against real or personal property within the district. Section 738, Revised Statutes. But that act extended the authority of the court to a suit brought to remove any incumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought." Jellenik v. Huron Copper Mining Company, 177 U. S. (Vol. 20, Sup. Ct. Rep. 562.)

In the case of Shinwald v. Lewis, 5 Fed. Rep. 516, it was held that Section 738 Revised Statutes was only intended to reach those suits in equity in which it was sought to enforce some pre-existing lien or claim, legal or equitable, upon or to some specific property, and not to cases in which it is sought to reach and appropriate the general property of the defendant to the payment of his debts. By the words "legal or equitable lien or against real or personal property", Congress intended to reach every case in which there should be any sort of charge upon specific piece of property capable of being enforced by a court of equity. This statute applies only to suits in equity; and such suits are expressly excluded from the operation of Section 914 of the Revised Statutes. It is the procedure only in law cases that is to be regulated by the procedure of the state courts under this statute. The adoption of the state practice in law cases by act

of Congress makes such state law a part of the Federal procedure within such state. And this court has held that this Section 914 does not apply to such steps as may be necessary for the Federal Courts to obtain jurisdiction of the cause. Such jurisdiction must be obtained under the constitution and the laws of the United States. Our contention is that the state court having acquired jurisdiction of the property of the defendant situated within the district by the process of attachment the removal of the cause into the Federal Court carried with it the same jurisdiction into said court. But notice is necessary to the defendant before the state court could proceed to appropriate the property by a judgment, execution and sale to the payment of the plaintiff's debt. This being an action at law, we insist that Section 914 is applicable and that the publication and substituted service are mere matters of formal practice and not jurisdictional in cases of this kind.

In the case of Dormitzer v. Illinois, etc. Bridge Company, 6 Fed. Rep. 217, it was held that the jurisdiction to enforce a lien, etc., given by this section means a lien, etc., existing anterior to the suit, and not one caused by the institution of the suit itself.

While Section 8 of the act of March 3, 1875, enlarges the subjects to which its provisions apply over the subjects embraced in Section 738 of the Revised Statutes, it does not change the equitable character of the remedies conferred.

We admit that where Congress has undertaken to prescribe a mode of procedure for the courts of the United States it is exclusive of all state legislation upon the same subject. And we submit that Section 914 is wholly independent of the provisions of Section 8 of the act of March 3, 1875. Section 914 by its very terms excludes equity cases. The aforesaid Section 8 by its very terms embraces only equity cases and therefore excludes all law cases.

This court it seems to us is obliged to hold either that the court below was right in holding that the plaintiff in error by appearing in the State Court and filing his petition for a removal of the case thereby admitted that he had notice of the pendency of the action and of the attachment against his property in the State Court; or that the service of summons by publication or substituted service was correct under the provisions of Section 914 R. S. The fact of the appearance of the plaintiff in error in the state court with his petition for removal operated as an estoppel upon him to deny that he had notice. This notice being admitted, and the court having jurisdiction of the *res*, what is there to prevent the Circuit Court of the United States from exercising its jurisdiction to proceed to judgment and the sale of the attached property for the payment of the debt?

It will be noticed that in the case of the Wabash Western Railway Company vs. Brow, 17 Sup. Supreme Court, Rep. 128, this court say, referring to certain cases in which a contrary doctrine was

supposed to have been held than the one held in this case. "These were all cases of attachment and jurisdiction asserted in state courts through the levy of writs." This is the thing which distinguishes the case at bar from the cases of Goldy vs. Morning News, 156 U. S. 518, and of the Wabash Western Railway vs. Brow, 164 U. S. 271, and of the case of the National Accident Society vs. Spiro, 164 U. S. 281, and of the other cases cited by counsel for the plaintiff in error.

In the case of Pennoyer vs. Neff, 95 U. S. supra, it was distinctly held that the state legislatures had the power to pass laws to subject the property of a non-resident debtor within their jurisdiction to the payment of debts of such non-resident. Perhaps all the states of the American Union have statutes of this kind. To hold that such non-resident debtor can come into the state court with his petition and transfer the case to the United States Circuit Court after the property has been attached and before service by publication or otherwise and thus get rid of the case and defeat the resident creditor of his right under the state statute to subject the property to the payment of his debt, would be to render all such statutes practically inoperative. Such statutes are made for non-resident and fugitive debtors. Such a holding would be to convert the United States Courts into a house of refuge for such non-resident debtors by fleeing to which they can escape the payment of their just debts.

All of which is respectfully submitted,

N. W. McCONNELL,
Counsel for Defendant in Error.